

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965
No. 210

JAMES T. STEVENS, PETITIONER,

vs.

CHARLES MARKS, JUSTICE OF THE SUPREME
COURT OF NEW YORK, COUNTY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE
SUPREME COURT, FIRST JUDICIAL DEPARTMENT
IN THE COUNTY OF NEW YORK

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Original Print

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 26, 1965

Original Print

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[fol. 1]

**IN THE APPELLATE DIVISION OF THE SUPREME
COURT, FIRST JUDICIAL DEPARTMENT IN
THE COUNTY OF NEW YORK**

In the Matter of
The Application of
JAMES T. STEVENS, Petitioner,
—against—

The Honorable CHARLES MARKS, Justice of the
Supreme Court of the State of New York,
County of New York, Respondent,

To review and annul, pursuant to Article 7801 of the Civil Practice Laws and Rules the adjudication and the Order and Warrant of Commitment dated July 30, 1964, adjudging Petitioner in Criminal Contempt of Court, and punishing him therefor.

NOTICE OF MOTION—Dated September 28, 1964

Sirs:

Please Take Notice that upon the annexed petition of James T. Stevens sworn to the 27th day of August, 1964, and upon the Mandate of Order dated July 30, 1964, the Waiver of Immunity dated June 26, 1964, the Termination of Employment dated July 15, 1964, the Stenographer's Minutes dated July 28, 1964, a Special Proceeding brought pursuant to 7801 of the C.P.L.R. and Section 762 of the Judiciary Law, shall be returnable at a Motion Term of the Appellate Division appointed to be held in and for the First Department at the Appellate Division Courthouse, Madison Avenue and 25th Street, City of New York, on the 6th day of October 1964 at 1 P.M., why the Order of Mandate dated July 30, 1964 should not be declared annulled and why the \$250 fine paid by the Petitioner should

not be remitted to the Petitioner and granting such other and further relief as justice requires.

Dated: New York, New York, September 28, 1964.

Molony & Schofield, Esqs., Attorneys for Petitioner,
137 So. Main Street, New City, Rockland County,
New York.

[fol. 2] cc: The Honorable Frank S. Hogan, 155 Leonard
Street, New York 13, New York.

Chief Clerk of the Supreme Court, New York County,
60 Centre Street, New York, New York.

[fol. 4]

ATTACHMENT TO NOTICE

**IN THE APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK**

In the Matter of
The Application of

JAMES T. STEVENS, Petitioner,

—against—

Honorable CHARLES MARKS, Justice of the
Supreme Court of the State of New York,
County of New York, Respondent,

To review and annul, pursuant to Article 7801 of the Civil
Practice Laws and Rules the adjudication and the Order
and Warrant of Commitment dated July 30, 1964,
adjudging Petitioner in Criminal Contempt of Court,
and punishing him therefor.

PETITION—Dated August 27, 1964

To the Honorable Presiding Justice and Associate Justice
of the Appellate Division of the Supreme Court of
the State of New York, First Judicial Department:

The petition of James T. Stevens, respectfully shows and alleges:

1. This petition pursuant to Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law is made to obtain relief from a Mandate of Order made and entered by the Respondent on the 30th day of July, 1964, (a copy of which is annexed hereto and marked Exhibit 1) wherein he adjudged petitioner guilty of criminal contempt of court and sentenced him to a fine of \$250.00 and to imprisonment for thirty days in the civil jail of the County of New York.

2. I am over twenty-one years of age, am a citizen of the United States, and at all times hereinafter mentioned was and still am a resident of 164 Engert Avenue, Brooklyn, County of Kings, State of New York.

[fol. 5] 3. Respondent, Honorable Charles Marks, was and now is a Supreme Court Judge of New York County.

4. Respondent, Supreme Court of New York County, is a duly constituted judicial tribunal, having jurisdiction of criminal offenses committed in New York County.

5. On June 25, 1964 while performing a four to midnight tour of duty, I was informed to report the next morning at 9:30 A.M. to the office of Deputy Chief Inspector, Joseph McGovern. When I reported to Inspector McGovern I was given a subpoena to report immediately to the New York County Grand Jury and a Captain Jones from that office was assigned to take me to the Grand Jury.

When I arrived at the Grand Jury, an Assistant District Attorney informed me that under the New York State Constitution and the New York City Charter, that I, as a member of the New York City Police Force had to sign a limited waiver of immunity or else my job would be terminated. According to the said subpoena, I was only appearing there as a witness and having received this legal advice from the District Attorney I immediately signed the said limited waiver of immunity. (A copy of which is annexed

hereto and marked Exhibit 2.) I was immediately taken into the Grand Jury Room and after identifying myself by rank, name and assignment, I was then once again advised with reference to the provisions of the State Constitution and the City Charter with reference to losing my job and also told that I had a right under the United States Constitution to refuse to answer any questions that might tend to incriminate me.

Immediately after being sworn, I was apprised by the Assistant District Attorney that I had been called there as [fol. 6] a potential defendant not as a witness and this was the first time I realized that I should have been advised by legal counsel of my choosing. However, since I had signed this waiver outside the Jury room, I did not now wish to immediately disclaim this document until I consulted an attorney. As a member of the New York City Police Department having completed 18 years of service towards a 20 year retirement, this act of signing was not done freely and voluntarily but done solely because of being threatened by the loss of my position and my pension rights.

On July 15, 1964, I was again subpoenaed to appear before the Third July 1964 Grand Jury and having now for the first time retained counsel to advise me and on the advice of my Attorneys, Molony & Schofield, Esqs., 137 So. Main Street, New City, Rockland County, New York, I claimed my rights not to incriminate myself under the Federal and State Constitutions. On this occasion I also asked to withdraw the limited waiver of immunity previously signed before the June Grand Jury. As a result, of this action, I received a letter from the Chief Clerk of the New York City Police Department terminating my employment. Said letter is dated July 16, 1964. (A copy of which is annexed hereto and marked as Exhibit 3.)

On July 22, 1964, I was again subpoenaed to appear before the First June 1964 Grand Jury at which time I again refused to answer standing on my state and federal

constitutional rights. I honestly and reasonably felt and believed that my testimony might disclose or tend to disclose, or might be construed as disclosing, facts or circumstances, or a link therein pointing or tending to point or to suggest criminal conduct on my part. I felt that this [fol. 7] would put me in jeopardy and expose me to the hazards of a criminal charge in connection with the matters in issue. My refusal to testify was not only under the fifth and fourteenth amendments but also based on the fact that I was not advised of my rights of counsel under the sixth and fourteenth amendments since I was not advised properly by the District Attorney.

Immediately after my refusal on July 22, 1964, I was taken to Supreme Court of the County of New York before the Honorable Charles Marks and was asked the following question:

"Now I am going to ask you point blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

My response was the same in which I previously and in good faith claimed my said Constitutional privilege, the Respondents refused to sustain the same, and directed me, under threat of punishment for criminal contempt, to answer the said question. Thereupon, on my refusal to answer the said question, the Respondents purported summarily to adjudicate me guilty of criminal contempt of court and postponed execution of sentence until July 28, 1964. When I appeared on that date my Attorneys, Molony & Schofield, appeared with me and gave their legal argument as to why the judgment of criminal contempt by the Honorable

Charles Marks should be vacated. (A copy of which is annexed hereto and marked Exhibit 4.) After hearing said argument the Court stayed the execution of sentence for five days for the purpose of making application to the Appellate Division for a stay pending appeal.

[fol. 8] On August 4, 1964, my Attorneys appeared before the Honorable Bernard Botein Presiding Justice of the Appellate Division and at that time he refused to stay the execution of my sentence and on August 5, 1964 I started serving my 30 days in the County Civil Jail of New York County located at 434 West 37th Street, New York City.

6. The said purported adjudication against me in criminal contempt of Court for said refusal to answer said questions, and the punishment imposed therefor are, under the circumstances disclosed, erroneous, illegal and unwarranted in that:

(a) The same were and are contrary to the provisions of both the Federal and State Constitutions with respect to my protection against self-incrimination and my right to counsel, and under said circumstances, constitute an unlawful invasion of my right and privilege and operate to deny to me the due process of law and the equal protection of the laws, within the meaning of both Constitutions, and constitute an arbitrary and capricious exercise of judicial power possessed by the Respondents.

(b) My refusal to answer such questions was not contumacious and not unlawful, within the meaning of Sec. 750 of the Judiciary Law, because such refusal was made in good faith and on advice of counsel.

(c) That I asked to withdraw my Limited Waiver of Immunity and since I had not given any relevant testimony to the Grand Jury it was arbitrary and capricious on the part of the Respondents, the District Attorney and the Grand Jury to refuse to allow me to withdraw the Limited Waiver of Immunity.

7. Except for this proceeding, Petitioner has no adequate remedy at law or in equity to review and annul the [fol. 9] said purported adjudication for criminal contempt, and to review and annul said Order and Warrant of Commitment, and this proceeding is expressly authorized by Section 752 of the Judiciary Law of the State of New York.

8. No previous application for the relief herein sought has ever been made.

Wherefore, I pray, that an order issue, directing Respondents and each of them, to show cause why I should not have a final order, pursuant to the provisions of Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law, annulling said purported determination and adjudication for criminal contempt of Court made by said Respondents against me, and annulling said Order and Warrant of Commitment, and granting such other and further relief in the premises as justice requires.

Dated: New York, New York, August 27, 1964.

James T. Stevens, Petitioner.

Duly sworn to by James T. Stevens, jurat omitted in printing.

[fol. 10]

EXHIBIT 1 TO PETITION

At a term of the Supreme Court in and for the County of New York; Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 30 day of July, 1964.

P R E S E N T :

Honorable CHARLES A. MARKS,

Justice.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JAMES T. STEVENS, a witness before the First June, 1964 Grand Jury of the County of New York.

Mandate of Order Adjudging Witness Guilty of Contempt.

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, and it appearing to the satisfaction of the court that James T. Stevens, on July 22, 1964, after being duly summoned and sworn in the manner prescribed by law as a witness, in a certain matter pending before such Grand Jury whereof they had cognizance, against John Doe et al., for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there

refuse to answer legal, proper and relevant questions which [fol. 11] were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

Q. What is your full name?

A. With the rank?

Q. Yes.

A. Lieutenant James T. Stevens.

Q. And where are you assigned?

A. 11th Division, Brooklyn.

Q. And you are a police officer of New York City Police Department?

A. I am. I am.

Q. Lieutenant Sulliyan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

A. I do.

Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that?

[fol. 12] A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?

A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engerts E-n-g-e-t-s, Avenue Brooklyn?

A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engerts Avenue, Brooklyn—" There appears to be a signature, "James T. Stevens," is that the—you signature?

A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you?

[fol. 13] A. I did, sir.

Q. And you understand the import of it?

A. I do.

Q. And was this signed in the presence of a notary?

A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that?

A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it?

A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on July 1st with that questionnaire completed; do you understand that?

A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

[fol. 14] Thereafter on July 15, 1964 James T. Stevens appeared before Third of the July 1964 Grand Jury of the County of New York and the following took place:

JAMES STEVENS, Lieutenant, New York City Police Department, appeared as a witness, but was not sworn, stated as follows:

By Mr. Scotti:

Q. Is your name James Stevens?

A. That's correct, sir.

Q. Sit down, please. What is your rank?

A. Lieutenant.

Q. Where are you assigned?

A. Presently?

Q. Yes.

A. 11th Division.

Q. And previously?

A. Manhattan North.

Q. Now, lieutenant, you appeared before the First June 1964 Grand Jury not too long ago, correct?

A. That's correct.

Q. And you signed a waiver of immunity before that grand jury; is that correct?

A. To my understanding it was a partial waiver.

Q. A limited waiver of immunity?

A. Limited, that's correct.

Q. We explained it to you at that time?

A. That's correct, yes.

Q. Now, it becomes necessary for this grand jury to examine you before them in connection with the

investigation that's being conducted before this grand jury to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in connection with the enforcement of the gambling laws of the state of New York.

[fol. 15] Are you willing to sign this waiver of immunity known as a limited waiver of immunity, which means that you waive immunity with respect to matters that are related to your official conduct or to the performance of your official duties?

A. I am not.

Q. You refuse to do so?

A. I refuse to do so.

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official duties, you understand that?

A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination?

A. Right, sir.

Q. That you can invoke at any time?

A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer?

A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter?

A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First

June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that?

A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and upon his advice, he advised me to withdraw my partial waiver of immunity.

[fol. 16] Q. You mean your limited waiver of immunity?

A. Partial or limited, yes, sir, whichever.

Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury?

A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions?

A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify?

A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that?

A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the consti-

tution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right?

A. I do. I've been advised by my counsel now.

Q. You refuse to do so?

A. I do so, yes.

Mr. Scotti: You're excused.

Witness: Thank you.

(Witness excused.)

On July 22, 1964 the said James T. Stevens again appeared before the said First of the June, 1964 Grand Jury of the County of New York and the following took place:

[fol. 17] JAMES STEVENS, recalled as a witness, having been previously duly sworn, further testified as follows:

By Mr. Scotti:

Q. Your name is James T. Stevens?

A. That's correct, sir.

Q. Now, you appeared before this grand jury on June 26th of this year, you were sworn and you signed what was has been characterized as a limited waiver of immunity which was explained to you at the time; am I correct?

A. At this time I refuse to answer on my State and Federal—my constitutional rights.

Q. Well, if you recall, Mr. Stevens, Mr. Andreoli put to you a number of questions before you were sworn advising you that you were being called as a potential defendant and not as a witness, and finally asking you, after explaining the nature of the waiver of immunity, whether you were willing to sign this waiver of immunity, and you did sign this waiver of immunity; am I correct?

A. I refuse to answer on the grounds of violation of my constitutional rights.

Q. Well, on that occasion you were directed by the grand jury to fill out a financial questionnaire and return it to this grand jury filled out; am I correct?

A. I refuse to answer on the constitutional rights.

Q. I explained to you last time when you appeared with your attorney before another grand jury that in my opinion you are legally obligated to answer proper questions that relate to the nature of this investigation by virtue of the fact that you waived immunity as required of public officers by the constitution of the State of New York and the City Charter. I explained that to you; am I correct?

A. I refuse to answer on the grounds of—same answer.

Q. Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, [fol. 18] during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you?

A. I refuse to answer on the grounds of State and Federal constitution.

Q. I want to show you this waiver of immunity, Grand Jury Exhibit #16, entitled People of the State of New York against John Doe, et al., waiver of immunity, "I, Lieutenant James T. Stevens," is this the waiver of immunity you signed?

A. I refuse to answer on the grounds—State and Federal constitution.

Mr. Scotti: Mr. Foreman, it now becomes my duty to appear before the court and makes an application on behalf of this grand jury for a direction from the court to this witness.

(Mr. Scotti, Mr. Andreoli, the Foreman, the witness, and the stenographer leave the grand jury room.)

And the Court, on the said day, after hearing argument by counsel for the said James T. Stevens, and the District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following proceeding took place in Part 30 of the Supreme Court of the County of New York on July 22, 1964:

[fol. 19]

• • • • •

The Court: Mr. Stevens, I am directing the Court Reporter to read to you the question that was submitted to you and about which you were interrogated by Mr. Scotti before the First June 1964 Grand Jury, which Grand Jury I understand granted you immunity, and I understand that you signed a limited—

Mr. Scotti: No—before which he executed a waiver of immunity.

The Court: I say he executed a limited waiver of immunity, and under the circumstances I direct the Reporter to read the question to you. Go ahead.

Grand Jury Reporter:

"Question by Mr. Scotti:

"Question: Now I am going to ask you point-blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct

their gambling operations in violation of the Penal Law of the State of New York? Did you?

"Answer: I refuse to answer on the grounds stated in the State and Federal Constitution."

The Court: Now, Mr. Stevens, having heard the question read to you by the Court Reporter, that is my question to you, and I direct you to answer it. What is your answer?

Mr. Stevens: I stand on my Constitutional rights, your Honor.

The Court: All right. Under the circumstances of your refusal to answer, the Court finds you guilty of criminal contempt of this Court and will pronounce sentence upon you Friday—

Mr. Molony: I would like a week.

The Court: Is there any objection to Tuesday?

Mr. Scotti: Tuesday I have no objection.

[fol. 20] The Court: Tuesday, July 28, 1964. And you are to appear in this Court at 11:00 A.M. on July 28th for that purpose.

Mr. Scotti: May I respectfully suggest to the Court that the record show that this witness has refused to comply with the direction? He merely said, "I stand on my Constitutional rights" and has not indicated—

The Court: That is a refusal. Do you refuse to answer the question?

Mr. Stevens: I do, sir, on my Constitutional rights.

The Court: Now, in the interval, counsel—Mr. Molony, is it?

Mr. Molony: Molony.

The Court: If you have any memorandum to submit to me before Tuesday, I will be glad to receive it; and send it to my chambers.

Mr. Molony: Yes, your Honor. May we have argument on Tuesday at 11:00 or just submit a memorandum?

The Court: Well, you come down Tuesday; and after I see the memorandum, perhaps it may need argument. All right.

Mr. Molony: Thank you, your Honor.

Mr. Scotti: Thank you, your Honor.

The court then permitted counsel for James T. Stevens to submit a memorandum of law on July 28, 1964 and heard reargument by Counsel and the District Attorney.

The witness James T. Stevens having on July 22, 1964 contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

[fol. 21] ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be directed to pay a fine of \$250 and be committed to the custody of the Sheriff of City of New York at Civil Jail, 434 W. 37 St., City, County and State of New York for a term of 30 days, the execution of said order to be stayed for five days from the service of the mandate to permit the witness to apply to the appellate division for a stay.

CHARLES MARKS
J.S.C.

[fol. 22]

EXHIBIT 2 TO PETITION**THE PEOPLE OF THE STATE OF NEW YORK****—against—****JOHN DOE, ET AL.****WAIVER OF IMMUNITY**

I, LT. JAMES T. STEVENS residing at 164 Engert Ave—Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

/s/ JAMES T. STEVENS

WITNESS:

/s/ JEROME P. CRAIG

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 26 day of June, 1964, before me personally appeared JAMES T. STEVENS to me personally known and

known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

/s/ JANET D. WINSTON

JANET D. WINSTON

Notary Public, State of New York

No. 03-4309493

Qualified in Bronx County

Certificate Filed in New York County

Commission Expires March 30, 1965

[fol. 23]

EXHIBIT 3 TO PETITION

(Seal)

POLICE DEPARTMENT

CITY OF NEW YORK

NEW YORK 13, N. Y.

July 15, 1964

Mr. James T. Stevens
164 Engert Avenue
Brooklyn, New York

Dear Sir:

I have been directed to inform you that you having appeared before the Third July, 1964 Grand Jury of the County of New York, on the 15th day of July, 1964, and having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter, the Police Commissioner has ordered that your employment as a member of the Police Department of the City of New York be terminated, and your office vacated.

Very truly yours,

/s/ LOUIS L. STUTMAN

Louis L. Stutman

Chief Clerk

[fol. 24]

EXHIBIT 4 TO PETITION

Mr. Molony

**SUPREME COURT
OF THE STATE OF NEW YORK**

COUNTY OF NEW YORK

**SPECIAL AND TRIAL TERM : PART XXX
JUNE 1964 TERM CONTINUED**

In the Matter

of

the Application by the District Attorney, New York County,
for a Direction to James T. Stevens, a Witness before
the First June 1964 Grand Jury.

100 Centre Street,
New York 13, N. Y.,
July 28, 1964.

Stenographer's Minutes

**MICHAEL J. MICKELL, C. S. R.,
Official Stenographer.**

[fol. 25]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
SPECIAL AND TRIAL TERM : PART XXX
JUNE 1964 TERM CONTINUED

In the Matter
of

the Application by the District Attorney, New York County,
for a Direction to James T. Stevens, a Witness before
the First June 1964 Grand Jury.

100 Centre Street,
New York 13, N. Y.,
July 28, 1964.

Before :

HON. CHARLES MARKS, J.

APPEARANCES:

For the People : MESSRS. MOLONY & SCHOFIELD,
Chief Assistant District Attorney,
and

PETER D. ANDREOLI, Esq.,
Assistant District Attorney.

For the Witness : ALFRED J. SCOTTI, Esq.,
137 South Main Street,
New City, Rockland County,
State of New York,
By Gerard E. Molony, Esq.,
Of Counsel.

[fol. 26] The Clerk: Part XXX is now in recess. Part XXX, June 1964 Term, is now in session.

This is a witness before the June, 1964, Grand Jury, the First Grand Jury. The name of the witness is James T. Stevens.

Counsel, will you put your name on the record.

Mr. Molony: Molony & Schofield, 137 South Main Street, New City, Rockland County, New York, by Gerard E. Molony.

Your Honor, I would like a few things stipulated to complete the record. I think the record is in pretty good shape.

Mr. Scotti, will you stipulate that—I would like the District Attorney to stipulate, first, that Officer Stevens became a member of the New York City Police Department on September 16, 1946.

Mr. Scotti: That is the information. I so stipulate, Your Honor.

Mr. Molony: That a notice, dated July 15, 1964, was sent to Officer Stevens telling him that he was discharged from the New York City Police Department.

Mr. Scotti: Yes.

The Court: So stipulated.

Mr. Molony: A stipulation that no relevant testimony [fol. 27] was given by Officer Stevens at any of his four appearances before either the June or the July Grand Jury.

Mr. Scotti: I do not so stipulate, Your Honor. The record speaks for itself.

Mr. Molony: May we see a copy of the Grand Jury minutes of those appearances, Your Honor?

Mr. Scotti: I will be delighted to show it to His Honor.

The Court: Did I understand you, Mr. Molony, to say "no relevant testimony"?

Mr. Molony: That's right, Your Honor.

[Thereupon, a transcript of the Grand Jury Minutes referred to was submitted to the Court and the Court perused the same.]

The Court: An examination of the testimony in which this witness, James T. Stevens, appeared before the First June 1964 Grand Jury indicates and shows that certain questions were asked of this witness and that he signed a limited waiver of immunity. There were other questions asked of him with reference to his position and a financial questionnaire was given to him at that time to sign. That is the First June 1964 Grand Jury so that there will be no question about it.

[fol. 28] He was again called before the Third July 1964 Grand Jury and it was at that time that he refused to testify either before the First or the Third Grand Jury, the First June 1964 Grand Jury or the Third July 1964 Grand Jury; and he refused to sign a limited waiver of immunity for the Third July 1964 Grand Jury; and he asked at that time to, using his words, I think, to have his partial waiver nullified.

Mr. Molony: Your Honor, what I am trying to clarify—I don't know whether I am making myself clear—is, just assuming for the sole purpose of argument that Officer Stevens did not give any relevant testimony, he didn't waive his rights unless this limited waiver was executed.

The Court: Well, what you call "relevant testimony" may have been considered by someone to be relevant. It is a question whether an answer to his name is relevant and other things are not relevant questions and relevant testimony; particularly, in view of the nature of the investigation, that they are relevant, because, if you ask it of a bootblack, it need not be relevant, although it might be there.

Mr. Molony: Do any questions do more than identify the witness, Your Honor?

[fol. 29] The Court: Well, they are part of the relevancy of the entire matter.

Mr. Molony: May we have the limited waiver of immunity, which it is alleged that Officer Stevens signed, put into the record, Your Honor? I have never seen it.

The Court: Do you have the limited waiver that he signed?

Mr. Andreoli: The Grand Jury has it. We can get it.

Mr. Molony: May we have a photostatic copy put into the record?

Mr. Scotti: I made that part of the record last time, Your Honor.

The Court: Was it read into the record?

Mr. Molony: No, Your Honor.

Mr. Scotti: I think I made reference to it and I offered to show it to Your Honor. Your Honor said, "I will take your word for it."

The Court: Well, then, we will consider it as part of the record of the case and a photostat will be given to counsel for the witness.

Mr. Scotti: And, Your Honor, may I also suggest that we make the transcript to which you alluded a little while [fol. 30] ago part of the record also.

Mr. Molony: I consent to that, Your Honor.

The Court: All right. Mark it a Court's exhibit.

[The transcript referred to was marked Court's Exhibit 1.]

The Court: And the limited waiver of immunity, signed by the witness for the First June 1964 Grand Jury, shall also be considered in evidence as a Court's exhibit, with the understanding, Mr. Scotti, that a photostat of the same will be placed in the record and a copy thereof given to counsel for the witness.

Mr. Scotti: Yes, Your Honor.

Mr. Molony: May we also have a stipulation that it was on the first occasion that Officer Stevens was represented by attorneys that he asked to withdraw his limited waiver.

The Court: I did not get that.

Mr. Molony: That the first time that Officer Stevens asked to withdraw his limited waiver was the first time he appeared with counsel in this proceeding.

Mr. Scotti: I think it is apparent from the transcript. I can't concede that, Judge. I don't know.

The Court: That he appeared where?

[fol. 31] Mr. Scotti: He appeared for the first time or consulted a lawyer for the first time.

The Court: He didn't say that. "He appeared." There is a difference between "consulted" and "appeared."

Mr. Scotti: I am glad you clarified that.

Yes, I will accept that, to my knowledge.

Mr. Molony: May we also have the record clarified, Your Honor. It is my understanding, based on what was said here the last time in court before Your Honor, that there is no claim that this witness has been given immunity. The claim is that he has signed a valid waiver and that he refused to testify under it, and that is why Your Honor has found him guilty of criminal contempt, is that right?

The Court: That covers the situation.

Mr. Molony: Thank you, sir.

This is in the nature of a motion for reargument under section 2221 of the Civil Practice Law and Rules on the grounds that Your Honor has already found the defendant guilty of criminal contempt, and that the feeling of counsel is that Your Honor overlooked a very relevant and recent decision of the United States Supreme Court. I am referring to the decision in Malloy versus Hogan, which was [fol. 32] decided by the Supreme Court of the United States on June 15, 1964.

Prior to the decision in Malloy versus Hogan, the Fifth Amendment had never been deemed operative as against the states. Every case decided before that had held that the Fifth Amendment was binding in any federal proceeding but not in a state court proceeding.

The Malloy versus Hogan case involved a gambling matter where Malloy had been convicted of a misdemeanor for gambling in Connecticut, was sent to jail on the misdemeanor, later got out, was subpoenaed to appear before a grand jury and to give certain relevant testimony as to who engaged the attorney, paid for the bail bond, and so forth, on his previous conviction. The witness balked and

claimed his rights under the Federal and State Constitutions. The highest court in Connecticut affirmed the order on record on the grounds that there was a one-year statute of limitations on gambling in Connecticut then and one year had already passed, so he had no right as a matter of law to refuse to testify, because there was nothing that they could prosecute him for, since the statute had run.

The appeal came to the United States Supreme Court, a seven-to-two decision. As to the question of constitutionality, Judge Brennan held that the clause of the Fifth [fol. 33] Amendment saying a person had a right not to incriminate himself is now binding on the states through the Fourteenth Amendment.

This is a major reversal of all the laws which existed in the United States prior to that decision. The practical effect of it is it overrules the Regan case, which I think Your Honor relied on when you found this gentleman guilty.

I think it is accepted that the Fifth Amendment now applies to the states. There is no doubt about this.

Originally, the New York State Constitution—Article I, subdivision 6, is the immunity statute—gave to all citizens, except there is one particular subdivision of Article I, subdivision 6, which applies to public officers, which we will concede would apply to Officer Stevens in this case, which says that, in the event any public officer refuses to waive immunity before a grand jury, he is to be discharged and cannot hold public office for the following five years; and there is a provision of the New York City Charter, section 1123, which is to the same effect. Under this section 1123, under which Mr. Stevens received notice that he was no longer a member of the New York City Police Department, he has [fol. 34] a constitutional right not to give evidence against himself. No statute, no state constitution, can take away that right or in any way limit it.

Here we have a situation where if that section of the New York State Constitution can still be held valid, their refusal

to follow the supremacy of the Federal Constitution—furthermore, the Federal Court never held that the Fifth Amendment is effective against any state—the provision in the State Constitution would be valid and the provision in the Charter based on the state provision would be valid.

Now, the Supreme Court has said this man has the same rights that we have in any federal prosecution; and I think that the decision of Justice Black—he dissented in the Regan case—will now be held to be the law in the United States today based on the decision of Justice Brennan in the Malloy versus Hogan case.

Justice Black said that the effect of allowing such a situation where a man goes to such a job where he has got to waive his constitutional rights would mean that any private employer could also say to a person that goes to work, "You can only work for me if you sign an agreement now [fol. 35] that you will not claim the Fifth Amendment against self-incrimination, nor claim the provision you are entitled to counsel, nor claim the provision you can't have any illegal search."

I say this would certainly be obnoxious. There is no provision that I could find in the Federal law which in any way requires any Federal employee to sign any waiver or that he will lose his job. There may be some. I can't find them.

The Court: Frankly, interrupting you for a moment, which I don't usually like to do, I don't see anything in the Malloy against Hogan case which indicates there is any violation of the Constitution in the statute which requires a man, if he does not sign a waiver, that he may be discharged. Where is there anything in the Malloy case to that effect? I have read through it this morning.

Mr. Molony: That is from the dissenting opinion in Regan versus the State of New York.

The Court: Then your argument is that the dissenting opinion in the Regan case is now supported by the Malloy case. Well, that I can't see. It is a long opinion, and I had to read it rather hastily this morning; but from what I read, I can't see that.

[fol. 36] Mr. Molony: You can't see where the dissenting opinion of Justice Black stated—

The Court: On that question.

Mr. Molony: On signing a waiver?

The Court: That's right.

Mr. Molony: Well, if you have a constitutional right, no statute can take away the constitutional right; no state constitution can take away the constitutional right given to you by the Federal Constitution.

So it is our claim here that the Federal Constitution now gives any public officer in New York State and anywhere else, makes him coequal with any other citizen who is not in public employment, and he can still claim the Fifth Amendment, but—

The Court: And it is your contention that this statute—the New York State and the Administrative Code are both in violation of the United States Constitution?

Mr. Molony: That's right. Or the New York State constitution is in violation, and the New York City Charter provision, section 1123; and it is also our contention here, Your Honor, that this witness gave no relevant testimony, without Your Honor passing on the constitutional question, and Your Honor can so decide, that this witness gave no relevant testimony and had a right to withdraw his limited waiver of immunity; that he was no longer a member of the Police Department when he appeared before Your Honor for sentence.

If that provision has any binding effect here, it certainly has this binding effect. After he left the Police Department in the Regan case, in the situation where Regan had signed a waiver, it wasn't until after eighteen, twenty months that he signed a waiver, that he objected and asked to withdraw. That is not the practical situation here.

We also claim that Stevens was entitled to be advised by counsel from the very beginning of this proceeding. He was advised by the District Attorney as to his rights. We say he was improperly advised. This was after June, June 15, 1964, and he was told that if he didn't sign a limited

waiver of immunity, he would lose his employment, after almost eighteen years in the Police Department and six citations for meritorious duty.

We say that this is coercion, which is referred to in the Malloy case—the slightest bit of coercion—and doesn't take [fol. 38] away the man's rights to raise a constitutional question; for certainly his employment, his livelihood, that he had worked at all his adult life, to be discharged from that employment would certainly be that type of coercion which would compel him to sign a limited waiver.

The Court: Are you through?

Mr. Molony: Yes, Your Honor.

The Court: All right.

Do you want to say anything, Mr. Scotti?

Mr. Scotti: Your Honor, with all due respect to Mr. Molony, I hardly think it is necessary for me to make a reply, although duty requires that I do so; and, Your Honor, pardon me if I appear to be belaboring what is absolutely obvious to you.

Now, I read those cases, too, before he made this argument this morning. I don't see any connection between the Malloy case and the Hogan case.

Mr. Molony: They are both the same cases.

The Court: You mean Malloy against—

Mr. Scotti: Malloy against Hogan, and the other—

The Court: The Regan case.

Mr. Scotti: No. There is another case that involved a confession which you also quoted in your memorandum, [fol. 39] which I first looked at speedily.

The Court: The other case is the—

Mr. Scotti: All right. It doesn't make any difference.

The Court: —Slochower case.

Are you talking about the Board of Education, the teacher, Slochower?

Mr. Scotti: I don't think that was the case, Your Honor, but I recall the substance of the decision. That is more important.

As Your Honor brought out a little while ago, the Malloy case did not involve the execution of a waiver of im-

munity. It simply involved a matter of interpretation of the standard required for the valid assertion of the constitutional privilege against self-incrimination.

The Supreme Court in Connecticut maintained that the bookmaker, who had been previously convicted, invoked his privilege frivolously; there was no danger of his incriminating himself. Whereas, the Supreme Court of the United States maintained it wasn't frivolous and the witness had a valid reason for invoking his privilege. In other words, no matter how insignificant the testimony may be, if it con-[fol. 40] stitutes the slightest link in a chain of evidence that might ultimately result in the establishment of the crime for which he could be convicted, then it would provide a proper basis for the invocation of his constitutional privilege against self-incrimination. That is all there was to that decision.

Here we have a valid execution of a waiver of immunity.

Now, in the Regan case, that same question was brought up. Regan had not given testimony in the sense that counsel now urges. You had an exact parallel there. He executed a waiver of immunity and was requested to fill out a financial questionnaire. Looking at the financial questionnaire, he decided to change his mind and he wouldn't like to answer the questions and, therefore, chose to withdraw the waiver of immunity.

Suffice it to say that our courts sustained the contention of the People that the execution of the waiver of immunity was valid; and the Supreme Court of the United States, not even taking a position as to whether it was valid or not, said that the witness was obligated to answer a legal and [fol. 41] proper interrogatory. So that the issue was premature. In other words, if the waiver of immunity is valid, then the testimony can be used against him. On the other hand, if the waiver of immunity is not valid, then he receives immunity. But, under any circumstances, he is presently legally obligated to answer the question.

And that was the position taken by Justice Reed.

So that the Supreme Court took the position it did not wish to pass on the question as to whether the execution of the waiver was valid or not.

Our Court of Appeals, however, did maintain that it was valid and for good reason. After all, it is not for him to change his mind after he finds out what the People are going to ask him; and I think it was quite apparent in the brief examination of the witness at the time that he was going to be asked certain questions concerning his financial status. In fact, he was asked to fill out a financial questionnaire. So at that time he knew what line the interrogation would take, and it would be improper and completely unjustified at that time for him to change his mind.

So that, Your Honor, we have here no basis at all for the contention now made by the counsel for the witness. You have a valid execution of a waiver of immunity and, [fol. 42] therefore, he is legally obligated to answer the obviously proper and legal questions put to him. The last one, you recall, Your Honor, was the one that you repeated in open court, and there is no question about the relevancy and materiality of that question, because it goes to the very heart of this investigation.

So that, Your Honor, I urge that judgment in this instance be executed.

Mr. Molony: Now, may I have a chance to reply to Mr. Scotti—

The Court: Yes.

Mr. Molony: —just to clarify a point.

The Supreme Court of the United States makes an analogy between confessions and the right to not testify in a Grand Jury proceeding. The Malloy versus Hogan case was a right not to testify in the Grand Jury proceeding.

I would like to read just a few sentences which answer the point made by Mr. Scotti as to the question of signing this waiver. Our claim is that he was coerced into signing a waiver, and we feel this is something that Your Honor has to pass on today. Under the Malloy decision, if Your

Honor finds that he was coerced into signing a waiver, [fol. 43] then the conviction of criminal contempt cannot stand.

I have the Lawyers' Edition of the Supreme Court decision. You may have one of the others, but I don't know if I am reading from the same page. I have the Lawyers' Edition.

The Court: The Lawyers' Edition.

Mr. Molony: Is that what you have, Your Honor?

The Court: Lawyers' Edition.

Mr. Molony: I am reading from page 658, the third column, towards the bottom:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself." Under this test, the constitutional inquiry is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession is 'free and voluntary.' "

This is the important part from our point of view:

"... that is, it must not be extracted by any sort of [fol. 44] threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence....'"

It then continues after the citation of cases.

"In other words, the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed."

Now, we claim the coercion here, Your Honor, was the taking of this man's livelihood away and is far greater than

the coercion in Haynes versus Washington. We say, if Your Honor finds coercion—this man only signed a waiver because it meant his job, and this meant coercion—we think that, under the decision and the law, Your Honor must find that this man has not committed any criminal contempt and is not bound by the—

The Court: In reading the Malloy case in connection with other cases, you overlook the fact that to become a member of the Police Department of the City of New York is a privilege and it is nothing he is compelled to do; and there has been some case where they refused certiorari on [fol. 45] a member of the bar of the State of New York—

Mr. Molony: That is the Cohen case.

The Court: The Cohen case, that's right. —where there was no coercion ordinarily because it was a privilege, and under the privilege one is not being coerced if he is asked to sign a waiver of immunity under the statute.

Mr. Molony: May it please the Court—Mr. Scotti, if you don't mind—the difference in the Cohen case is that he has no right to claim his privilege under the Fifth Amendment, because the Fifth Amendment doesn't apply to the states.

I say that prior to Malloy, the state could do anything they wanted with their public employees, because it was not in violation of the Federal Constitution, since the Fifth Amendment did not apply. I say that the Cohen case or any case decided before June 15—

The Court: I don't see that the Malloy case extends it that far, particularly in this case, where an examination of the testimony taken in the Grand Jury at the time that the limited waiver of immunity was signed by the witness indicates nothing, as a matter of fact, to warrant the finding that there was any coercion used at that particular moment. I assume your claim of coercion is that he had hanging over him the fact that, if he didn't sign it, there would be an automatic discharge.

Mr. Molony: And he was so informed by the Assistant District Attorney.

The Court: That is true.

Mr. Molony: As to that fact.

The Court: That is true.

Mr. Molony: And where the Assistant District Attorney does not properly advise on the law—I don't say this with any reflection on the District Attorney; no reflection on him—

The Court: I understand you, but I don't see where the Malloy case extends it that far. In any event, it is quite evident, in my opinion, that the execution of the limited waiver of immunity is a valid execution thereof, and is still valid.

Mr. Molony: That would be like someone making a confession, and maybe through the confession you find proof, and then the court overrules the confession.

The Court: When that point reaches the United States Supreme Court, anything can happen. I have seen a lot of [fol. 47] changes in the last few years in their decisions; and I am now reading the Wainwright case.

Mr. Molony: *Gideon versus Wainwright*.

The Court: "Gideon's Triumph." I went out to the book store and paid \$4.95 to read the book, because it is a very interesting book and it has some interesting facts in it.

What's wrong with that, when a judge spends \$4.95 to read a book?

I don't quite agree with you, Mr. Molony, because, in reading this—I said I read it through rather hastily because it is a long opinion—and I have read the Regan case definitely, and to me it seems that the Regan case has not been overridden.

Mr. Molony: The Regan case holds that a person in a state court proceeding is not given protection under the Fifth Amendment. That is contrary to Malloy, Your Honor.

The Court: But the other part of it is a question as to whether or not he may revoke a waiver or the signing of a waiver of immunity. There is nothing in the Malloy case which refers to that. I understand your theory—that the waiver has been coerced by reason of the fact that there

[fol. 48] was, if not a direct threat, an implied threat under the state laws that then existed and still do exist, that he would lose his job and be discharged automatically.

Well, that is a matter for the higher courts to decide. I am not going to decide contrary to what I believe to be the law at this time.

Mr. Molony: Your Honor, will you give us a stay, then, of the sentence for three days?

The Court: Therefore, since this is in the nature of a reargument, having granted the application for reargument, I adhere to my original decision and find the witness in criminal contempt of this court, and I fine the witness the sum of \$250 and thirty days in the Civil Jail of the City of New York.

On the question of the stay, I want to hear what the District Attorney states on the execution of that sentence.

Mr. Scotti: What is the purpose of the stay?

Mr. Molony: Getting the man out pending appeal. We feel we have a constitutional question and we would like to litigate it; and it doesn't do our man much good to be in jail for thirty days and get a Pyrrhic victory.

Mr. Scotti: No objection, Your Honor.

[fol. 49] Mr. Molony: Thank you, Your Honor.

The Court: You are going to file, I assume, an appeal from this decision.

Mr. Molony: We are going to file an appeal.

The Court: On the question of a stay—until the decision of the Appellate Division?

Mr. Scotti: There is a procedural matter involved here.

The Court: May I get your thought on this, Mr. Scotti. I had intended to grant a stay until the application is made to the Appellate Division—

Mr. Molony: Yes, Your Honor.

The Court: —for a stay pending appeal to that court. Now, to be honest with all of you here, I don't know how those applications are taken care of during the summer months.

Mr. Molony: We will try to figure it out, Your Honor. I understand over in the Second Department that they go to a Justice of the Appellate Division. I understand they do here, sir, too.

The Court: I think there is always a Justice of the Appellate Division sitting in the First Department.

Mr. Molony: I think I have been informed to the contrary, but that may be only hearsay.

[fol. 50] The Court: I know there was someone there because I received two telephone calls last week from two Justices of the Appellate Division, from 25th Street.

Mr. Molony: So, in other words, we have a stay until the Appellate Division passes on it. If they vacate the stay, fine.

The Court: Is there any objection to that?

Mr. Scotti: I have no objection, Your Honor.

The Court: Shall I say the application for a stay should be made within the next—what is today, Tuesday!—the application should be made to the Appellate Division within the next five days, shall we say?

Mr. Scotti: And at that time we will have the mandate drawn up.

The Court: That's right.

Mr. Scotti: So you will have to appeal from the mandate. That is the only suggestion that I have to make.

The Court: Suppose you present the mandate tomorrow.

Mr. Scotti: Tomorrow.

The Court: And you may have five days after the mandate is signed as a stay of the execution thereof for the [fol. 51] purpose of making an application to the Appellate Division for a stay pending appeal.

Mr. Molony: Thank you, Your Honor.

The Court: All right.

Mr. Andreoli: We are giving counsel a photostatic copy of the waiver of immunity signed before the Grand Jury and a photostatic copy is offered as an exhibit.

[The Waiver of Immunity Referred to Was Marked Court's Exhibit 2.]

The Clerk: Part XXX, June 1964 Term, is now in recess. Part XXX, June 1964 Term, is adjourned to September 30, 1964. Part XXX, June 1964 Term, has already been continued and extended to September 30, 1964, subject to being reconvened at any earlier date, subject to any order of the court.

MICHAEL J. MICKELL,
Official Stenographer.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of my stenographic notes, taken during the foregoing proceedings in the above-entitled matter in the Supreme Court of the State of New York, County of New York, Special and Trial Term, Part XXX, June 1964 Term Continued, on July 28, 1964.

/s/ MICHAEL J. MICKELL C.S.R.,
Official Stenographer.

[fol. 52]

In the Appellate Division of the Supreme
Court held in and for the First Judicial
Department in the County of New York.

Present—Hon. Charles D. Breitel, Justice Presiding;
Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon.
Samuel W. Eager, Hon. Earle C. Bastow, Justices.

7909

In the Matter of the Application of
JAMES T. STEVENS, Petitioner,

for an order pursuant to Section 7801 of the
Civil Practice Law and Rules, etc.,

vs.

Honorable **CHARLES MARKS**, Justice of the Supreme Court
of the State of New York, Respondent.

**ORDER GRANTING MOTION TO DISMISS THE PETITION AND
DISMISSING PROCEEDINGS—October 30, 1964**

The above-named petitioner, James T. Stevens, having presented a petition, verified the 28th day of August, 1964, praying for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 762 of the Judiciary Law, annulling the order of mandate dated July 30, 1964, and remitting the \$250 fine paid by petitioner; and for other relief,

And Hon. Frank S. Hogan, District Attorney, New York County, having filed and served upon the petitioner on the 5th day of October, 1964, a notice of motion, pursuant to Section 7804(F) of the Civil Practice Law and Rules, to dismiss the petition herein as a matter of law; and said

proceeding having duly come on to be heard before this Court on the 6th day of October, 1964,

Now, upon reading and filing the notice of application, dated September 28, 1964, with proof of due service thereof, the petition of James T. Stevens, duly verified the 28th day of August, 1964, and the affidavit of John P. Schofield, duly sworn to the 6th day of October, 1964, all read in support of the petition, and the notice of motion to dismiss the petition [fol. 53] dated October 5, 1964, by Hon. Frank S. Hogan, District Attorney, New York County, with proof of due service thereof, and the affidavit of Michael R. Stack, Assistant District Attorney, duly sworn to on the 5th day of October, 1964, all read in opposition to the application of the petitioner and in support of the motion to dismiss the petition; and after hearing Mr. John P. Schofield in support of the petition and in opposition to the motion to dismiss the petition, and Hon. Frank S. Hogan, District Attorney, New York County, in opposition to the application of the petitioner, and in support of the motion to dismiss the petition; and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the motion of Hon. Frank S. Hogan, District Attorney, New York County, to dismiss the petition as a matter of law, be and the same hereby is granted and the proceeding be and the same hereby is unanimously dismissed, without costs.

Enter:

Vincent A. Massi, Clerk.

[fol. 54] [File endorsement omitted]

[fol. 55]

In the Appellate Division of the Supreme Court held in and for the First Judicial Department at the Court House of the Appellate Division in the County of New York.

Present:—Hon. Benjamin J. Rabin, Justice Presiding; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Aron Steuer, Justices.

The Court announces the following decisions:

Breitel, J.P., Valente, Stevens, Eager and Bastow, JJ.

7909

In the Matter of the Application of
JAMES T. STEVENS, Petitioner,

for an order pursuant to Section 7801 of the
Civil Practice Law and Rules, etc.,

vs.

Honorable CHARLES MARKS, Justice of the Supreme Court
of the State of New York, Respondent.

MEMORANDUM DECISION—October 30, 1964

Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the Grand Jury of New York County—which was investigating allegations of bribery and corruption in the Police Department—he signed a limited waiver of immunity. When recalled before that Grand Jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Su-

preme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the Grand Jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In *Regan v. New York*, 349 U.S. 58, it was clearly held that one circumstance as petitioner herein, was required to testify before the Grand Jury. If the waiver were invalid, petitioner would have received immunity from prosecution under Sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion [fol. 56] that *Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory v. Hogan*, 378 U.S. 1, and *Escobedo v. Illinois*, 378 U.S. 478, on the constitutionality of Article I, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

[fol. 57]

IN THE APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

for an order pursuant to Section 7801 of the
Civil Practice Law and Rules, etc.,

vs.

Honorable CHARLES MARKS, Justice of the Supreme Court
of the State of New York, Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT
OF APPEALS—Filed November 25, 1964

SIR:

Take Notice that upon the annexed affidavit of Gerard E. Molony, Esq., verified the 10th day of November, 1964, upon the record on review, the memorandum decision, the order of this court and all other papers herein, the petitioner will move this court, at a term thereof, to be held at the Appellate Division Courthouse at 25th Street and Madison Avenue, Borough of Manhattan, City and State of New York, on the 17th day of November, 1964, at 1:00 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order granting the Petitioner leave to appeal to the Court of Appeals from the Order of this Court dated the 30th day of October, 1964, dismissing the Petition together with such other and further relief as to the Court may seem proper.

Dated: New York, N. Y., November 10, 1964.

Yours, etc.,

Molony & Schofield, Attorneys for Petitioner, 137
South Main Street, New City, Rockland County,
New York.

To: Hon. Frank S. Hogan, District Attorney, New York
County, 155 Leonard Street, New York, New York.

[fol. 58]

ATTACHMENT TO NOTICE OF MOTION
AFFIDAVIT OF GERARD E. MOLONY

State of New York,
County of New York, ss.:

Gerard E. Molony, being duly sworn, deposes and says:
That I am an attorney duly licensed to practice law in
the State of New York and I am a member of the firm of
Molony and Schofield located at 137 South Main Street,
New City, Rockland County, New York, attorneys for Peti-
tioner and fully familiar with the facts and proceedings
heretofore had.

This affidavit is submitted for the purpose of obtaining
permission for leave to appeal to the Court of Appeals pur-
suant to Section 5602 of the C.P.L.R.

Facts

This was an original proceeding commenced in the
Appellate Division by the Petitioner pursuant to Section
7801 of the C.P.L.R. for the purpose of reviewing an ad-
judication and order and warrant of commitment dated
[fol. 59] July 30, 1964 which adjudged the Petitioner guilty
of criminal contempt of court.

The petitioner, James T. Stevens, who is a Lieutenant
of the New York City Police Department, was given a
forthwith subpoena to appear and testify before the June,

1964 Grand Jury. The Petitioner, not having time to get an attorney, was advised of his rights by an Assistant District Attorney. He was told that unless he signed a limited waiver of immunity under Section 1123 of the New York City Charter, that he would lose his position as a member of the New York City Police Department. Petitioner signed the limited waiver of immunity but did not give any material testimony. He was subsequently called before the July, 1964 Grand Jury where the Petitioner appearing with counsel, refused to sign a limited waiver of immunity and asked to withdraw the limited waiver of immunity which he had signed before the June, 1964 Grand Jury.

Petitioner refused to answer questions in the Grand Jury Room relying on his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the New York State Constitution.

After the Petitioner had signed a limited waiver of immunity, the District Attorney advised him that any evidence which he gave before the Grand Jury might be used to indict him for a crime.

This court by a five-to-nothing memorandum decision sustained the conviction of criminal contempt of the Petitioner. An Order was entered on October 30, 1964.

Law

If the Petitioner answered the relevant questions of the [fol. 60] District Attorney, he would not know whether he would face an indictment for bribery which could result in imprisonment for ten years or whether he had a constitutional right to refuse to answer the questions. It is respectfully submitted by your deponent that the court erred in finding the Petitioner wilfully refused to answer a question before the Grand Jury when the Petitioner could not tell whether it might lead to his indictment for a crime or whether he did have immunity if he gave testimony which would indicate that he had committed a crime.

It is submitted that the Petitioner has lost three great constitutional rights by the decision of this court.

First, the Grand Jury system was created for the purpose of protecting those accused of crime and not for the purpose of protecting the sovereign. Here the Petitioner's conduct in the Grand Jury Room has led to his imprisonment even though he does not know what his rights are and the court has held him in contempt for failing to risk running the gauntlet of convicting himself out of his own mouth rather than by being accused of committing a crime by others.

Second, the courts have recognized that defendants are entitled to be represented by counsel after indictment for a crime. Certainly it is equally as important that a potential defendant subpoenaed to testify before a Grand Jury is entitled to counsel and should certainly be advised of his right to counsel before being asked to sign any waiver of immunity.

Third, the Petitioner's claim of the privilege against self-incrimination under the Fifth and Fourteenth Amendments [fol. 61] of the United States Constitution has been guaranteed to citizens in Federal proceedings since the time of the creation of the United States in 1789 and is now guaranteed to citizens against the action of State governments since June 15, 1964, by the decision of the Supreme Court in the Case of *Malloy v. Hogan* (378 U.S. 1).

The court, in its Memorandum Decision, relied on the Case of *Regan v. New York* (349 U.S. 58). At the time of the Regan decision there was no privilege against self-incrimination guaranteed to Regan in a State Court proceeding guaranteed under the United States Constitution. However, the dissent of Justice Black, concurred in by Justice Douglas, is based on a privilege against self-incrimination guaranteed to citizens in State proceedings. Although the major premise on which Justice Black based his dissent in Regan was not the law then, it is the law today

since the Malloy decision and it follows that the reasoning of Justice Black represents the present law today rather than the majority opinion of Justice Reed which antedated the Malloy decision.

Upon information and belief, your deponent is informed that at least 160 members of the New York City Police Department have executed limited waivers of immunity before the July, 1964 Grand Jury, City of New York, County of New York. To your deponent's knowledge, this is the first case on appeal which raises the question of validity of Section 1123 of the New York City Charter and Article I, Section 6 of the New York State Constitution insofar as said section relates to public officers signing limited waivers of immunity. Since there is a likelihood of a multitude of [fol. 62] appeals arising as to the validity of the Charter and State Constitution Sections, it is respectfully submitted that permission should be granted in the sound discretion of this court to allow an appeal to be taken to the highest court of the State so that the new problem raised by the decision of Malloy v. Hogan may be finally answered by the highest court of the State.

Wherefore, your deponent respectfully requests that this court grant permission for leave to appeal to the New York State Court of Appeals.

Gerard E. Molony

Sworn to before me this 10th day of November, 1964.

John P. Schofield, Notary Public, State of New York,
No. 44-3524710, Qualified in Rockland County, Commission
Expires March 30, 1965.

[fol. 63] [File endorsement omitted]

[fol. 64]

IN THE APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

For an order pursuant to Section 7801 of
the Civil Practice Law and Rules, etc.,

against

HONORABLE CHARLES MARKS, Justice of the Supreme Court
of the State of New York, Respondent.

AFFIDAVIT IN OPPOSITION

State of New York,
County of New York, ss.:

Michael R. Stack, being duly sworn, deposes and says:

1. That he is an Assistant District Attorney regularly appointed in the County of New York and is fully familiar with all the facts and circumstances pertaining hereto.

2. This affidavit is submitted in opposition to a motion seeking permission for leave to appeal to the Court of Appeals pursuant to Section 5602 of the Civil Practice Law and Rules.

3. The petitioner was a lieutenant in the Police Department of the City of New York. On June 25, 1964, he was called upon to testify before a New York County Grand Jury which was, and is currently investigating certain allegations of bribery and corruption in the Police Department of this City. Prior to being sworn as a witness, the petitioner was asked to sign a limited waiver of immunity. He did so after having been advised that he had a right

not to testify, but that if he did not so testify his employment with the City would be terminated. He was also advised that he was a potential defendant and not a witness, and that anything he said could be used against him [fol. 65] at a later proceeding. He thereafter answered a few questions and then left the jury room with instructions to return at a later date with a financial questionnaire, which had been given him, filled out.

4. On July 15, 1964, the petitioner, having been subpoenaed before the Third July 1964 Grand Jury, refused to give any further testimony stating that he wished to withdraw the limited waiver he had previously executed, and also claiming that his right not to incriminate himself and his right to counsel under the Federal and State Constitutions had been violated. The next day, pursuant to the applicable provision of the New York State Constitution and the New York City Charter, his employment as a police lieutenant was terminated.

5. On July 22, 1964, he was brought before the First June 1964 Grand Jury (before which he had originally executed the waiver and testified) and was asked the following question:

"Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operation in violation of the Penal Law of the State of New York, did you?"

6. He again refused to reply, and was forthwith brought before Justice Charles Marks, of the New York State Supreme Court, the respondent herein, and asked the identical question. Although petitioner was warned that a failure to answer would result in his being held in criminal con-

tempt of court, he wilfully persisted in his refusal to reply to the question, and was, accordingly, held in contempt.

7. Upon the application of his attorneys, execution of sentence was postponed for five days for the purpose of [fol. 66] making application to the Appellate Division for a stay pending appeal. On August 4, 1964, the Honorable Bernard Botein, Presiding Justice of the Appellate Division, First Department, refused to grant a stay of execution of the contempt pending appeal, and shortly thereafter the petitioner was incarcerated.

8. While petitioner was serving his 30 day sentence, he applied to the Southern District Court for a writ of habeas corpus on the basis that his right not to incriminate himself and his right to counsel had been violated in the State court proceedings. The Honorable William B. Herlands, District Judge, denied the petition on the basis that petitioner had failed to exhaust his State remedies. Thereafter, this decision was affirmed by the Circuit Court of Appeals.

9. Upon the expiration of petitioner's 30 day sentence for contempt he filed on September 28, 1964, in this Court, a petition to review and annul pursuant to Article 7801 of the Civil Practice Laws and Rules the adjudication and the order and warrant of commitment dated July 30, 1964, adjudging petitioner in criminal contempt of court and punishing him therefor.

10. On the same date [September 28, 1964], he was again called to appear before the First June 1964 Grand Jury but again refused to answer the same question as above-mentioned in paragraph 5 and was accordingly held in contempt of court by Judge Schweitzer of the New York State Supreme Court. Justice Schweitzer accorded the petitioner 5 days in which to apply to the Appellate Division for a stay of execution of the sentence pending appeal.

11. The petitioner did not apply to the State appellate court for a stay, but on the day before he was supposed

to surrender himself (October 7, 1964), he petitioned the United States District Court for the Southern District to [fol. 67] remove the proceedings to that court pursuant to Title 28 U.S.C. Section 1443.

12. The District Court McMahon, J., on October 20, 1964, vacated and dismissed the petition for removal noting that

"It appearing that the petition for removal was not filed until after petitioner Stevens was convicted in the state court, that petitioner seeks to do by indirection what he could not do directly, i.e., test the validity of a waiver of immunity in advance by testifying, and that neither the provisions in the State Constitution nor the New York City Charter, providing for waivers of immunity, violated any State or Constitutional right, the within motion is in all respects granted and the petition for removal vacated and dismissed." 28 U.S.C. §1446 [c]; *Regan v. People*, 349 U.S. 58 [1955]; *Potter v. Carvel Stores of New York, Inc.*, 203 F. Supp. 462, 466 [D. Md. 1962]; *Biscup v. People*, 129 F. Supp. 265, W.D.N.Y. 1955]."

13. Thereafter, petitioner moved for re-argument, said motion was granted, and the original decision adhered to in all respects.

14. On October 30, 1964, petitioner again moved in this Court for an order pursuant to Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law to review and annul the adjudication by Judge Schweitzer finding him in contempt of court; and for a stay pending these proceedings. The application for a stay was denied (Valente, J.).

15. On November 2, 1964, this Court disposed of the original Article 78 proceeding brought by petitioner against Judge Marks with the following memorandum:

"Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of

New York, first appeared before the grand jury of New York County—which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to [fol. 68] the continued effectiveness of the waiver of immunity. In *Regan v. New York* (349 U.S. 58), it was clearly held that one circumstance as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that (*Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory v. Hogan* (378 U.S. 1 and *Escobedo v. Illinois*, 378 U.S. 478, on the constitutionality of Article I, Section 6, of the New York State Constitution and section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and

it must be determined whether he has accordingly received immunity or has effectively waived immunity."

16. In all of the proceedings outlined above petitioner has urged that he has been deprived of his right to counsel and further that he has been deprived of his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. He alleges that by reason of the decision in the recent case of *Malloy v. Hogan*, 378 U.S. 1 (1964), the dissenting opinion in the *Regan* case [*Regan v. New York*, 349 U.S. 58, 1955] is now the law.

17. These propositions were urged in each of the above-enumerated proceedings and were rejected. It is respectfully submitted that in view of the already overwhelming rejection of petitioner's claims there would be no purpose served in allowing petitioner to carry this case to the Court of Appeals. That Court as well as the Supreme Court of the United States in the *Regan* case, *supra*, has already passed on and rejected claims similar to that of petitioner.

18. The assertion of the invalidity of a waiver of immunity at this time is premature.

19. Wherefore, your deponent respectfully requests that [fol. 69] this Court deny petitioner permission for leave to appeal to the New York State Court of Appeals.

Michael R. Stack, Assistant District Attorney.

Sworn to before me this 18th day of November, 1964.

Francis Weisberg, Notary Public for the State of New York, Qualified in New York County, No. 31-9588100, Commission Expires March 30, 1966.

Copy to: Molony & Schofield, Esqs., 137 South Main Street, New City, Rockland County, New York.

[fol. 70] Affidavit of Service (omitted in printing).

[fol. 71]

In the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of November, 1964.

Present—Hon. Charles D. Breitel, Justice Presiding; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Earle C. Bastow, Justices.

14

In the Matter of the Application of
JAMES T. STEVENS, Petitioner-Appellant,
For an order pursuant to Section 7801 of the
Civil Practice Law and Rules, etc.

vs.

HONORABLE CHARLES MARKS, Justice of the Supreme Court
of the State of New York, Respondent.

ORDER DENYING LEAVE TO APPEAL—November 25, 1964

The above named petitioner-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on October 30, 1964

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Gerard E. Molony in support of said motion, and the affidavit of Michael R. Stack in opposition thereto, and after hearing Mr. Gerard E. Molony for the motion, and Mr. Michael R. Stack opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with \$10 costs.

Enter:

Vincent A. Massi, Clerk.

[fol. 72] [File endorsement omitted]

[fol. 73]

In the Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany.

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 56

In the Matter of the Application of

JAMES T. STEVENS, Appellant,

vs.

THE HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York, Respondent.

To review and annul &c.

ORDER DENYING LEAVE TO APPEAL—February 4, 1965

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

[fol. 74] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 76]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—May 5, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including June 3, 1965.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 5th day of May, 1965.

[fol. 77]

SUPREME COURT OF THE UNITED STATES

No. 210—October Term, 1965

JAMES T. STEVENS, Petitioner,

v.

CHARLES MARKS, Justice of the Supreme Court of New York,
County of New York

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department is granted limited to Question 1 presented by the petition which reads as follows:

“1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter re-

pugnant to the United States Constitution in that any public officer who refused to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The case is consolidated with No. 290 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1964

No. [REDACTED] 210

JAMES T. STEVENS,

Petitioner,

AGAINST

HONORABLE CHARLES A. MARKS, Justice of the
Supreme Court of New York, County of New York,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK**

CIVIL DIVISION FIRST JUDICIAL DEPARTMENT OF THE SUPREME COURT

GERARD E. MOLONY, Esq.,
MOLONY & SCHOFIELD,

Attorneys for the Petitioner,

No. 137 South Main Street,
New City, Rockland County,
New York.

GERARD E. MOLONY,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No.

— 0 —

JAMES T. STEVENS,
Petitioner,

AGAINST

HONORABLE CHARLES A. MARKS, Justice of the Supreme
Court of New York, County of New York,
Respondent.

— 0 —

PETITION FOR A WRIT OF CERTIORARI TO THE
~~COURT OF APPEALS OF THE STATE OF NEW YORK~~
~~APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE SUPREME COURT~~

To the Honorable, The Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the ~~New York State Court of Appeals dated February 4th, 1965 (Appendix p. 48)~~ which order denied petitioner leave to appeal from the order of October 30th, 1964 (Appendix p. 49) by the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, which order dismissed a petition seeking to review an order of the Supreme Court of the State of New York, New York County which order was dated July 30th, 1964 and summarily found the petitioner guilty of criminal contempt (Appendix pp. 13 to 24).

Opinions Below

The opinion of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York is reported in 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (Appendix pp. 25 to 26). There were no other opinions in the State courts.

After being held in contempt a third time petitioner moved for a writ of habeas corpus in the United States District Court for the Southern District of New York. The opinion of the District Court is reported in 239 F. Supp. 419 (Appendix pp. 27 to 34). An appeal was taken to the United States Court of Appeals for the Second Circuit. The opinion has not yet been officially reported (Appendix pp. 35 to 44).

Jurisdiction

The order of the Court of Appeals of the State of New York the highest tribunal in the State, was entered on February 4th, 1965. Mr. Justice Harlan signed an order dated May 5th, 1965 which extended the time to file a petition for a writ of certiorari until June 3rd, 1965.

~~THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK~~ Jurisdiction of this Court to review the order of the ~~NEW YORK STATE COURT OF APPEALS~~ by writ of certiorari is invoked under Title 28 of the United States Code, Section 1257 (2, 3), in that petitioner was deprived of his liberty and livelihood without due process of law, in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. In addition Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter are repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in that all public em-

ployees of the State of New York or its political subdivisions who claim a privilege against self-incrimination under the Fourteenth Amendment incur the penalty of forfeiture of their employment and are disqualified from holding any other public employment for a period of five years.

Article 1, Section 6 of the New York State Constitution is contained in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 1, Constitution, pages 67 and 68 of the pocket supplement (Appendix p. 44).

Section 1123 of the New York City Charter is contained in New York City Charter and Code, Volume 1, Page 307, 1963 edition published by Williams Press, Inc., Albany, New York (Appendix p. 45).

Questions Presented for Review

1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?
2. Is it a denial of a right to counsel to compel a potential defendant to appear before a grand jury without having the lawyer representing the people advise the potential defendant that he has a right to the advice of counsel?

Statement of the Case

On June 26th, 1964, the petitioner, a Lieutenant of the New York City Police Department, reported to the office of Deputy Chief Inspector McGovern. Stevens was given a subpoena to report immediately to the New York County Grand Jury and a Captain Jones was assigned to take him there (R. 12).*

Stevens was advised by an assistant district attorney that he had been called as a potential defendant and not as a witness. He was told that under the Constitution of the United States he had a right to refuse to answer any questions that might tend to incriminate him but if he desired to continue to hold his public position the New York State Constitution and New York City Charter required him to sign a limited waiver of immunity (Appendix p. 46).

The district attorney further informed Stevens that if he signed a limited waiver of immunity which required him to answer questions concerning the conduct of his public office and the grand jury indicted him that his testimony could and would be used against him (Appendix p. 15).

Stevens had completed 18 years of service and had only two years to go for retirement. Threatened with the loss of his position and pension rights and not having the advice of an attorney or being told that he had a right to counsel, Stevens signed the limited waiver of immunity (R. 13, 14).

On July 15, 1964 Stevens was subpoenaed to appear before the Third July Grand Jury where he refused to sign

* R refers to the page of the certified record of the Appellate Division of the Supreme Court, State of New York.

a new waiver of immunity and asked to withdraw the limited waiver of immunity which he had signed before the First June Grand Jury. Stevens stated that he had now been advised by counsel and that he would stand on his constitutional rights (R. 22, 23). The following day Stevens received a letter from the New York City Police Department informing him that his employment had been terminated for "having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter" (R. 30).

On July 22, 1964 Stevens was again subpoenaed to appear before the First June Grand Jury before which he had signed a limited waiver of immunity. He refused to answer any questions on the grounds of violation of his constitutional rights. He was asked:

"did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violations of the Penal Law of the State of New York; did you?"

Stevens refused to answer on the grounds of his federal and state constitutional rights (R. 24).

Brought before the respondent, the Honorable Charles A. Marks, a justice of the Supreme Court of New York, Stevens refused to answer the same question again relying on his constitutional rights (R. 26).

Found summarily guilty of contempt Stevens was committed to the civil jail for a period of thirty days and fined \$250. A stay of sentence pending review was denied by the Presiding Justice of the Appellate Division of the Supreme Court of the State of New York.

The Appellate Division of the Supreme Court of the State of New York dismissed the petition which sought to review the adjudication of contempt (R. 3).

Leave to appeal to the New York Court of Appeals was denied by the Appellate Division and subsequently on February 4, 1965 the New York Court of Appeals denied leave to appeal (R. 91).

Before the Appellate Division of the Supreme Court of New York had rendered its decision on the first contempt, Stevens was again subpoenaed to appear before the First June Grand Jury, asked the same question, and again refused to answer for the same reasons and was again found in contempt of court and given thirty days in civil prison and a fine of \$250. The same events occurred a third time but the United States District Court for the Southern District of New York released Stevens in his own recognizance on a petition for a writ of habeas corpus. The writ was denied by the District Court and an appeal was taken to the United States Court of Appeals for the Second Circuit which court affirmed the dismissal of a writ of habeas corpus by the District Court. These facts appear in the opinions of the District Court (Appendix p. 27) and the Court of Appeals (Appendix p. 35).

Stage of the Proceeding Where the Constitutional Issue Was First Raised

The Petitioner first raised the constitutional issue before a New York County grand jury and counsel raised it on oral argument before a Justice of the Supreme Court of the State of New York. The Petitioner was summarily found guilty of contempt.

An original proceeding to review the adjudication of summary contempt was brought before the Appellate Divi-

sion of the State Supreme Court. The original pleadings raised the federal constitutional issue.

The Petitioner first raised the question of the privilege against self-incrimination before the New York County grand jury on July 15, 1964 (Appendix p. 19).

"Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury? A. I—at this time I wish to stand on my constitutional rights."

First written pleading was an original proceeding before the Appellate Division of the Supreme Court of the State of New York. Page 4 of said pleading contains the following statement:

"On July 22, 1964, I was again subpoenaed to appear before the First June 1964 Grand Jury at which time I again refused to answer standing on my state and federal constitutional rights. I honestly and reasonable felt and believed that my testimony might disclose or tend to disclose, or might be construed as disclosing, facts or circumstances, or a link therein pointing or tending to point or to suggest criminal conduct on my part. I felt that this would put me in jeopardy and expose me to the hazards of a criminal charge in connection with the matters in issue. My refusal to testify was not only under the Fifth and Fourteenth Amendments but also based on fact that I was not advised of my rights of counsel under the Sixth and Fourteenth Amendments since I was not advised properly by the District Attorney.

"Immediately after my refusal on July 22, 1964, I was taken to Supreme Court of the County of

New York before the Honorable Charles Marks and was asked the following question:

"Now I am going to ask you point blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

"My response was the same in which I previously and in good faith claimed my said Constitutional privilege, the Respondents refused to sustain the same, and directed me, under threat of punishment for criminal contempt, to answer the said question."

The Court in its opinion answered the question raised by saying that the Petitioner had signed a valid waiver of immunity and that the Court considered the case of *Regan v. New York* (349 U. S. 58), as controlling and that the Court did not reach the question as to the effect of *Malloy v. Hogan* (378 U. S. 1), and *Escobedo v. Illinois*, (378 U. S. 478), on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position.

Reasons for Issuance of the Writ

The Appellate Division of the Supreme Court of the State of New York decided a substantial question involving the United States Constitution when it upheld the finding of contempt by one who claimed his privilege against self incrimination and refused to answer a question to which an affirmative answer would incriminate him. The highest court of New York denied permission to appeal. The decision of this Court in *Malloy v. Hogan*, 378 U. S. 1, held that the privilege against self incrimination in the Fifth Amendment is also protected by the Fourteenth Amendment against abridgement by the States. Malloy also held that a person had the right to remain silent unless he chooses to speak and to suffer no penalty for such silence. The New York State Constitution imposed the penalty of loss of public employment on petitioner for refusing to sign a waiver of immunity. The New York State Constitution in this respect is repugnant to the United States Constitution.

Petitioner was not advised that he had a right to counsel when he was compelled to appear before a grand jury even though he was called as a potential defendant. *Dictum* in *Escobedo v. Illinois*, 378 U. S. 478, indicates that under these circumstances petitioner was entitled to be advised of his right to counsel.

1. *The waiver signed by petitioner is invalid because it was obtained by coercion and was not a free and voluntary act.*

Under Article 1, Section 6 of the New York State Constitution all public employees of the State and its political subdivisions enjoy second class status if they claim their privilege against self incrimination. Failure to sign a limited waiver of immunity results in the imposition of a

penalty for claiming a Constitutional right. The employee loses his position, pension rights and the right to work in public employment for the next five years.

Stevens when called before the grand jury signed a waiver of immunity rather than lose his position after eighteen years of service with only two or more years to go in order to retire on a pension.

Prior to 1938 public employees in New York State were first class citizens under the State Constitution in that they were free to claim their privilege against self incrimination the same as private citizens in the State and the same as all citizens in a Federal proceeding.

At the New York State Constitutional Convention of 1938 the Constitution was amended to provide that any public employee who claimed his privilege would lose his job. This change in the Constitution was held valid by the highest court of New York in the case of *Canteline v. McClellan*, 282 N. Y. 166 (1940). At page 170 the Court stated:

"The people of the State may write such provisions into their Constitution as they see fit, without let or hinderance, subject only to the applicable portions of the Constitution of the United States. As to immunity from self-incrimination, there is no such applicable provision and such grant could have been omitted in its entirety from the present Constitution of our state. (*Twining v. State of New Jersey*, 211 U. S. 78)."

This was good law until *Twining v. New Jersey* was overruled by *Malloy v. Hogan*, 378 U. S. 1. This was also good law when this Court decided *Regan v. New York*, 349 U. S. 58, which case has been relied on by each of the three courts which have written opinions in this matter.

It is submitted that a reconsideration of *Regan v. New York* in light of *Malloy v. Hogan*, will result in *Regan* being overruled.

The dissenting opinion in *Regan* by Mr. Justice Black and concurred in by Mr. Justice Douglas is premised on the contention that the privilege against self-incrimination applies to the States through the Fourteenth Amendment. Since this is now the law *Regan v. New York* should be overruled so that public employees will know that Constitutional protection does extend to them. This would be in accord with previous holdings by this Court in *Wieman v. Updegraff*, 344 U. S. 183; *Ullman v. United States*, 350 U. S. 422; *Slochower v. Board of Education*, 350 U. S. 551; *Torasco v. Watkins*, 367 U. S. 488. In *Orloff v. Wiloughby*, 345 U. S. 83, 91, the Court stated:

"It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertions by communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so."

In *Steinberg v. United States*, 163 F. Supp. 590 (1958) the Court of Claims declared unconstitutional a statute which required a retired government employee to testify before a federal grand jury involving his previous government employment or forfeit his retirement annuity. No appeal was taken but this decision was approved by this Court in *Sherbert v. Vernier*, 374 U. S. 398, 404 (1962).

If Stevens has a Constitutional privilege against self-incrimination then his waiver was wrongfully obtained. However Stevens should not have to take the risk of testifying in advance of a decision of this Court as to the

validity of the waiver. To require otherwise would deny Stevens the practical protection of the Constitution and only give him a Constitutional right in theory.

2. *Petitioner was denied his Constitutional right to counsel.*

Stevens appeared before the Grand Jury as a compelled witness and as a probable defendant. The investigation had already focused on him. He was confronted by a lawyer representing the people. It is submitted that under these circumstances Stevens should have been advised by the lawyer representing the people that he was entitled to counsel. *Escobedo v. Illinois*, 378 U. S. 478.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERARD E. MOLONY,
MOLONY & SCHOFIELD,
Attorneys for the Petitioner.

GERARD E. MOLONY,
Of Counsel.

APPENDIX**Mandate of Order Adjudging Witness Guilty
of Contempt**

At a term of the Supreme Court in and for the County of New York; Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 30 day of July, 1964.

Present:

Honorable CHARLES A. MARKS,
Justice.

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JAMES T. STEVENS, a witness before the First June, 1964 Grand Jury of the County of New York.

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, heretofore duly appointed and sworn, and it appearing to the satisfaction of the court that James T. Stevens, on July 22, 1964, after being duly summoned and sworn in the

manner prescribed by law as a witness, in a certain matter pending before such Grand Jury whereof they had cognizance, against John Doe et al, for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there refuse to answer legal, proper and relevant questions which were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

Q. What is your full name? A. With the rank?

Q. Yes. A. Lieutenant James T. Stevens.

Q. And where are you assigned? A. 11th Division, Brooklyn.

Q. And you are a police officer of New York City Police Department? A. I am. I am.

Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that? A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that? A. I do.

Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that? A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that? A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that? A. I do.

Q. Are you prepared to sign a waiver of immunity? A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engerts E-n-g-e-t-s, Avenue Brooklyn? A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engerts Avenue, Brooklyn—" There appears to be a signature, "James T. Stevens," is that the—you signature? A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you? A. I did, sir.

Q. And you understand the import of it? A. I do.

Q. And was this signed in the presence of a notary? A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that? A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it? A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on July 1st with that questionnaire completed; do you understand that? A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

Thereafter on July 15, 1964 James T. Stevens appeared before Third of the July 1964 Grand Jury of the County of New York and the following took place:

JAMES STEVENS, Lieutenant, New York City Police Department, appeared as a witness, but was not sworn, stated as follows:

By Mr. Scotti:

Q. Is your name James Stevens? A. That's correct, sir.

Q. Sit down, please. What is your rank? A. Lieutenant.

Q. Where are you assigned? A. Presently?

Q. Yes. A. 11th Division.

Q. And previously? A. Manhattan North.

Q. Now, Lieutenant, you appeared before the First June 1964 Grand Jury not too long ago, correct? A. That's correct.

Q. And you signed a waiver of immunity before that grand jury; is that correct? A. To my understanding it was a partial waiver.

Q. A limited waiver of immunity? A. Limited, that's correct.

Q. We explained it to you at that time? A. That's correct, yes.

Q. Now, it becomes necessary for this grand jury to examine you before them in connection with the investigation that's being conducted before this grand jury to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in connection with the enforcement of the gambling laws of the State of New York.

Are you willing to sign this waiver of immunity known as a limited waiver of immunity, which means that you waive immunity with respect to matters

that are related to your official conduct or to the performance of your official duties? A. I am not.

Q. You refuse to do so? A. I refuse to do so.

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official duties, you understand that? A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination? A. Right, sir.

Q. That you can invoke at any time? A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer? A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter? A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that? A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and upon his advice, he advised me to withdraw my partial waiver of immunity.

Q. You mean your limited waiver of immunity?
A. Partial or limited, yes, sir, whichever.

Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury? A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions? A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify? A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that? A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the constitution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right? A. I do. I've been advised by my counsel now.

Q. You refuse to do so? A. I do so, yes.

Mr. Scotti: You're excused.

Witness: Thank you.

(Witness excused.)

On July 22, 1964 the said James T. Stevens again appeared before the said First of the June, 1964 Grand

Jury of the County of New York and the following took place:

JAMES STEVENS, recalled as a witness, having been previously duly sworn, further testified as follows:

By Mr. Scotti:

Q. Your name is James T. Stevens? A. That's correct, sir.

Q. Now, you appeared before this grand jury on June 26th of this year, you were sworn and you signed what has been characterized as a limited waiver of immunity which was explained to you at the time; am I correct? A. At this time I refuse to answer on my State and Federal—my constitutional rights.

Q. Well, if you recall, Mr. Stevens, Mr. Andreoli put to you a number of questions before you were sworn advising you that you were being called as a potential defendant and not as a witness, and finally asking you, after explaining the nature of the waiver of immunity, whether you were willing to sign this waiver of immunity, and you did sign this waiver of immunity; am I correct? A. I refuse to answer on the grounds of violation of my constitutional rights.

Q. Well, on that occasion you were directed by the grand jury to fill out a financial questionnaire and return it to this grand jury filled out; am I correct? A. I refuse to answer on the constitutional rights.

Q. I explained to you last time when you appeared with your attorney before another grand jury that in my opinion you are legally obligated to answer proper questions that relate to the nature of

this investigation by virtue of the fact that you waived immunity as required of public officers by the constitution of the State of New York and the City Charter. I explained that to you; am I correct? A. I refuse to answer on the grounds of—same answer.

Q. Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you? A. I refuse to answer on the grounds of State and Federal constitution.

Q. I want to show you this waiver of immunity, Grand Jury Exhibit #16, entitled People of the State of New York against John Doe, et al., waiver of immunity, "I, Lieutenant James T. Stevens," is this the waiver of immunity you signed? A. I refuse to answer on the grounds—State and Federal constitution.

Mr. Scotti: Mr. Foreman, it now becomes my duty to appear before the court and make an application on behalf of this grand jury for a direction from the court to this witness.

(Mr. Scotti, Mr. Andreoli, the Foreman, the witness, and the stenographers leave the grand jury room.)

And the Court, on the said day, after hearing argument by counsel for the said James T. Stevens, and the

District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following proceeding took place in Part 30 of the Supreme Court of the County of New York on July 22, 1964:

* * * * *

The Court: Mr. Stevens, I am directing the Court Reporter to read to you the question that was submitted to you and about which you were interrogated by Mr. Scotti before the First June 1964 Grand Jury, which Grand Jury I understand granted you immunity, and I understand that you signed a limited—

Mr. Scotti: No—before which he executed a waiver of immunity.

The Court: I say he executed a limited waiver of immunity, and under the circumstances I direct the Reporter to read the question to you. Go ahead.

Grand Jury Reporter:

"Question by Mr. Scotti:

"Question: Now I am going to ask you point-blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operations in order to permit these bookmakers and

policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

"Answer: I refuse to answer on the grounds stated in the State and Federal Constitution."

The Court: Now, Mr. Stevens, having heard the question read to you by the Court Reporter, that is my question to you, and I direct you to answer it. What is your answer?

Mr. Stevens: I stand on my Constitutional rights, your Honor.

The Court: All right. Under the circumstances of your refusal to answer, the Court finds you guilty of criminal contempt of this Court and will pronounce sentence upon you Friday—

Mr. Molony: I would like a week.

The Court: Is there any objection to Tuesday?

Mr. Scotti: Tuesday I have no objection.

The Court: Tuesday, July 28, 1964. And you are to appear in this Court at 11:00 A.M. on July 28th for that purpose.

Mr. Scotti: May I respectfully suggest to the Court that the record show that this witness has refused to comply with the direction? He merely said, "I stand on my Constitutional rights" and has not indicated—

The Court: That is a refusal. Do you refuse to answer the question?

Mr. Stevens: I do, sir, on my Constitutional rights.

The Court: Now, in the interval, counsel—Mr. Molony, is it?

Mr. Molony: Molony.

The Court: If you have any memorandum to submit to me before Tuesday, I will be glad to receive it; and send it to my chambers.

Mr. Molony: Yes, your Honor. May we have argument on Tuesday at 11:00 or just submit a memorandum?

The Court: Well, you come down Tuesday; and after I see the memorandum, perhaps it may need argument. All right.

Mr. Molony: Thank you, your Honor.

Mr. Scotti: Thank you, your Honor.

The court then permitted counsel for James T. Stevens to submit a memorandum of law on July 28, 1964 and heard reargument by Counsel and the District Attorney.

The witness James T. Stevens having on July 22, 1964 contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be directed to pay a fine of \$250 and be committed to the custody of the Sheriff of City of New York at Civil Jail, 434 W. 37 St., City, County and State of New York for a term of 30 days, the execution of said order to be stayed for five days from the service of the mandate to permit the witness to apply to the appellate division for a stay.

CHARLES MARKS
J. S. C.

Opinion of Appellate Division, First Department

22 App. Div. 2d 683

(253 N. Y. S. 2d 401)

Before:

BRIETEL, J. P., VALENTE, STEVENS, EAGER and BASTOW

Matter of Stevens, pet. (Marks, vs.)—Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the grand jury of New York County which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In *Regan v. New York* (349 U. S. 58), it was clearly held that one circumstance as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to re-

fuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that *Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory v. Hogan*, 378 U. S. 1 and *Escobedo v. Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

**Opinion of United States District Court for the
Southern District of New York**

WEINFELD, District Judge.

The petitioner, until recently a lieutenant with the New York City Police Department, is in custody upon a third state court judgment of conviction for contempt,¹ arising out of his refusal to answer a question put to him by a grand jury investigating alleged police corruption. He seeks his release by Federal writ of habeas corpus on the ground that his rights under the Fifth and Sixth Amendments were violated when, given the choice under New York law either of executing a limited waiver of immunity or losing his job,² he signed the waiver. He did not then have the benefit of counsel. Having previously been twice convicted for failing to answer the same question, he also advances a further contention that his present imprisonment constitutes double jeopardy.

On June 25, 1964, petitioner was served with a subpoena commanding his appearance before a June grand jury of

¹ To prevent expiration of petitioner's sentence pending decision, this Court issued a writ pursuant to which he was brought into Federal custody and, in the absence of opposition from respondent, released on his own recognizance. See *Johnston v. Marsh*, 227 F. 2d 528, 530 n. 4 (3d Cir. 1955).

² N. Y. Const. art. 1, §6 provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office * * *." A similar provision is contained in N. Y. C. Charter §1123.

the Supreme Court, New York County. Before entering the jury room, he was advised by an assistant district attorney that, pursuant to state law, unless he signed a waiver of immunity he would forfeit his job. He signed the waiver, whereupon he was brought before the grand jury, informed that he was a potential defendant and advised of his right against self incrimination and of state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity. He then acknowledged he had executed the waiver and understood its effect. Petitioner was sworn, asked his name and similar preliminary questions, and then given a financial questionnaire to complete and return. His next appearance was before a July grand jury, when, represented by counsel, he declined to sign another waiver and asked to withdraw the earlier waiver on the ground that he had not had time to confer with counsel prior to its execution. The following day he was discharged from the Police Department because of his refusal to sign a new waiver before the July grand jury. He was then summoned to reappear before the June grand jury (the one before which he had signed a waiver) and refused to answer any questions, including one with respect to alleged payments from bookmakers and policy operators. Upon reiteration of his refusal to answer before a Justice of the State Supreme Court, he was adjudged in contempt, sentenced to serve thirty days, and fined \$250. Pending an appeal to the Appellate Division, he sought a stay of the sentence, which was denied.³ When the Appellate Division affirmed his conviction⁴ and leave to appeal to the

³ Following this denial he applied for a writ of habeas corpus in this Court, which Judge Herlands denied for failure to exhaust available state remedies, which disposition was affirmed by our Court of Appeals.

⁴ Stevens v. Marks, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1st Dep't 1964).

Court of Appeals had been denied, he had already served his sentence and paid the fine.

Upon expiration of his first contempt conviction, on September 28, 1964 he was again called before the June Grand jury and again refused to answer the question asked of him in July, whereupon he was held in contempt and sentenced to another term of thirty days and fined \$250.⁵ His third refusal to answer the question before the June grand jury resulted, on January 15, 1965, in his third summary conviction and imposition of a similar sentence.

[1, 2] It is the State's contention that section 2254 of Title 28, United States Code, requires dismissal of this application on the ground that petitioner has failed, with respect to this third conviction, to exhaust presently available state remedies by an Article 78 proceeding, although it recognizes that his unsuccessful state court test of the first conviction raised the same self-incrimination and right to counsel questions here pressed. This Court is of the view that the exhaustion doctrine does not require petitioner to go through the formality of a futile, time-consuming appeal each time he is adjudged in contempt for failure to answer the same question. Indeed, section 2254 expressly excuses resort to the state courts where, as here, there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." To require repeated and fruitless applications for state court relief would not only confine him to a revolving door process leading nowhere, but "invite the reproach that it

⁵ Prior to surrender on this second conviction, petitioner sought to remove the proceeding to the Federal court for this district, pursuant to 28 U. S. C. §1443. Judge MacMahon dismissed the petition on October 20, 1964.

is the prisoner rather than the state remedy that is being exhausted."⁶

The State, however, is on firmer ground in advancing the exhaustion doctrine with respect to the petitioner's claim of double jeopardy. It was never presented to the state courts for consideration, presumably in light of a just decided New York Court of Appeals decision rejecting a similar argument.⁷ It was first raised in the petition for the instant writ, but was neither briefed nor argued. In view of the Court's basis for its disposition of this proceeding, it is unnecessary to consider whether the recent state rulings, which seemingly are dispositive of petitioner's double jeopardy plea, relieve him of applying first to the state court before applying to this Court for relief on that ground.

[3, 4] A more basic question is presented, although the State does not raise it, by the circumstance that the petitioner still has ample time within which to challenge his first conviction in the United States Supreme Court. The New York Court of Appeals denied leave to appeal on February 4, 1965; thus petitioner has through May 5 to move for direct review,⁸ but he has taken no such step. *Fay v. Noia*⁹ overruled *Darr v. Burford*¹⁰ to the extent

⁶ *United States ex rel. Kling v. La Vallee*, 306 F. 2d 199, 203 (2d Cir. 1962) (concurring opinion).

⁷ *Matter of Ushkowitz v. Helfand*, 15 N. Y. 2d 713, 256 N. Y. S. 2d 339, 204 N. E. 2d 498 (1965), relying on *Second Add. Grand Jury v. Cirillo*, 12 N. Y. 2d 206, 237 N. Y. S. 2d 709, 188 N. E. 2d 138, 94 A. L. R. 2d 1241 (1963). Compare *Yates v. United States*, 355 U. S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957); *People v. Riela*, 7 N. Y. S. 2d 571, 200 N. Y. S. 2d 43, 166 N. E. 2d 840, appeal dismissed and cert. denied, 364 U. S. 474, 915, 81 S. Ct. 242, 5 L. Ed. 2d 221 (1960).

⁸ U. S. Sup. Ct. R. 11(1); 28 U. S. C. A. §2101(c).

⁹ 372 U. S. 391, 435, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

¹⁰ 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1960).

that it conditioned Federal habeas corpus relief upon a prior certiorari application to the Supreme Court. But whether a prisoner may now proceed directly in a Federal district court to collaterally attack his state court conviction when a remedy is still available in the Supreme Court, and further, whether in an appropriate case the district courts have discretion to require pursuit of such available Supreme Court review,¹¹ is less clear.¹² Consistent with the Supreme Court's view that the "needs of comity" are adequately served by the exhaustion of state remedies and by the availability to the states of eventual review in the Supreme Court of Federal habeas corpus decisions,¹³ and that review by certiorari is more meaningful following compilation of a full and complete record by the lower Federal court, this Court concludes that a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him. However, the prisoner does not have an absolute right to bypass the Supreme Court. The district court, just as it has discretion to deny habeas corpus to a prisoner who has bypassed orderly state proce-

¹¹ See *Wade v. Mayo*, 334 U. S. 672, 680-681, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948), overruled in *Darr v. Burford*, 339 U. S. at 208-210, 70 S. Ct. 587, but arguably resurrected in *Fay v. Noia*, 372 U. S. at 435, 83 S. Ct. 822.

¹² The question is sometimes avoided by the petitioner's waiting ninety days before seeking Federal district court relief. See Appendix, p. 19a, *United States ex rel. Carthan v. Sheriff, City of New York*, 330 F. 2d 100 (2d Cir. 1964). Imposition of such a ninety-day waiting period however, seems contrary to *Fay v. Noia*'s advocacy of "swift and imperative justice on habeas corpus." 372 U. S. at 435, 83 S. Ct. at 847.

¹³ *Fay v. Noia*, 372 U. S. at 437-438, 83 S. Ct. 822.

dures,¹⁴ also has discretion to require him to exhaust currently available Supreme Court remedies. And the circumstances of this case justify requiring the petitioner here to seek such review.

[5] First, an appropriate amendment by the New York Court of Appeals of its remittitur would enable petitioner to appeal from the contempt conviction as of right on the ground that a state statute was "drawn in question" and upheld over his Federal constitutional objections.¹⁵ Secondly, failing to secure an adequate amendment to the remittitur to permit such an appeal as of right, petitioner would still be in a position to apply for certiorari; and in either event, bail could be granted.¹⁶ Thirdly, unlike most such applications,¹⁷ the petitioner's was prepared by counsel and presents an adequate basis for decision. Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim.

In *Regan v. People of State of New York*,¹⁸ a New York City policeman was summoned before a grand jury investigating corruption. He, too, executed a waiver of immunity, then sought to repudiate it on the ground that at the time of its execution he was under economic duress

¹⁴ *Id.* at 438; 83 S. Ct. 822.

¹⁵ 28 U. S. C. §1257(2). Of course, petitioner must apply for and obtain an amended remittitur indicating consideration and disposition of his Federal contentions. See *Ungar v. Sarafite*, 376 U. S. 575, 582-583, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

¹⁶ 18 U. S. C. §3144; *Hudson v. Parker*, 156 U. S. 277, 284-287, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

¹⁷ See *Brown v. Allen*, 344 U. S. 443, 492-495, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (separate opinion by Frankfurter, J.).

¹⁸ 349 U. S. 58, 75 S. Ct. 585, 99 L. Ed. 883 (1955).

and unclear as to his rights. Regan was convicted of contempt, although by a jury, for refusing to answer questions put to him by the grand jury. The Supreme Court held that, where there was an adequate immunity statute, Regan had no constitutional right to remain silent, and that his contentions with respect to the waiver were premature. Said the Court:¹⁹

“The waiver of immunity, although it does affect the possibility of subsequent prosecution, does not alter petitioner's underlying obligation to testify. Much of the argument before this Court has been directed at the question of whether the waiver of immunity was valid or invalid, voluntary or coerced, effectual or ineffectual. That question is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired.

* * * * *

“The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify.”

Petitioner's attempts to distinguish Regan are unpersuasive, the factual differences in the two cases appearing to have no relevance to the ground of decision there. Moreover, the Supreme Court last Term reaffirmed the basic premise underlying Regan: that valid state immunity legislation empowers a state to compel testimony

¹⁹ Id. at 62, 64, 75 S. Ct. at 587, 588.

which would otherwise be self-incriminating.²⁰ Unless Regan is to be overruled, resolution of petitioner's contentions concerning the validity of the waiver must await an attempt to prosecute him on the basis of compelled testimony,²¹ or an adjudication with respect to his employment rights.²² The District Court should not be called upon to divine whether Regan remains controlling authority. So long as an avenue to the Supreme Court is open, petitioner in these circumstances ought to avail himself of it.

The writ upon which petitioner was brought into Federal custody is dismissed and petitioner, having been released on his own recognizance pending determination of this proceeding, is directed to surrender to the State within five days.

²⁰ See *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 79, 93-100, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). The relevance of *Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) is less clear, since the Regan court seems to have proceeded on the assumption that the self-incrimination clause did apply.

²¹ See *People v. Guidarelli*, 255 N. Y. S. 2d 975 (3d Dep't 1965).

²² There is currently pending in the State Supreme Court petitioner's Article 78 proceeding to review his discharge. The State's answer contains an offer to restore petitioner to his position with back pay, provided he testifies pursuant to the waiver now under attack.

Opinion of the United States Court of Appeals

FOR THE SECOND CIRCUIT

KAUFMAN, Circuit Judge:

The principal issue on this appeal is whether a municipal employee could properly refuse to testify before a state grand jury by merely asserting that he did not voluntarily waive the immunity from prosecution conferred by state law. Although the validity of the waiver executed by the petitioner, James T. Stevens, has yet to be determined, he has thrice been adjudged in criminal contempt for refusing, despite directions from two New York State Supreme Court justices, to answer questions propounded by the grand jury. Claiming that he had exhausted the state remedies available to contest his first contempt conviction, the petitioner applied for a writ of habeas corpus in the United States District Court to challenge the third conviction, which like the first two carries a sentence of thirty days' imprisonment, a \$250 fine and in default of the fine an additional 30-day prison term. The District Court denied relief, alluding to a directly relevant Supreme Court holding, *Regan v. New York*, 349 U. S. 58 (1955), that any contentions respecting the validity of the waiver of immunity are, under such circumstances, premature and do not alter the underlying obligation to testify. We affirm.

The basic facts are undisputed, although seemingly complicated—as the following recitation will indicate—by petitioner's repeated efforts to test, in both the state and federal courts, his duty to testify. Stevens, a lieutenant in the New York City Police Department, was first served with a subpoena the morning of June 25, 1964, commanding his appearance as a witness before the First June 1964

Grand Jury, which was then investigating alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Outside the grand jury room, Stevens, without counsel at the time, was advised by an assistant district attorney to sign a limited waiver of immunity; otherwise, pursuant to the state constitution and city charter,¹ he would be subject to removal from office. Stevens executed the waiver and went before the grand jury. There he was informed that he was a potential defendant and advised of his privilege against self-incrimination and the state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity or else suffer disqualification from office for five years. Petitioner then acknowledged that he had already executed the waiver of immunity and understood its effect. He answered a few perfunctory questions, identifying himself by name, address, rank and police command, and was dismissed with instructions to return at a later date with a completed financial questionnaire.

On July 15, having been subpoenaed to appear before the Third July 1964 Grand Jury, Stevens—now represented and advised by counsel—declined to sign a new limited waiver of immunity prior to giving any further testimony before this grand jury. At that time he also sought to withdraw the waiver he had previously signed in connection with his appearance before the First June 1964

¹ The New York State Constitution, art. I, sec. 6, provides in part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision may be found in New York City Charter §1123.

Grand Jury, claiming that he had been denied the right to consult with counsel when it was executed. As a consequence of these actions, Stevens received formal notice, the following day, that his employment as a police lieutenant was terminated.

One week later, on July 22, Stevens was summoned to reappear before the First June 1964 Grand Jury. He quickly informed that body of his discharge from the police department since his appearance on June 25 and his attorney's advice that, notwithstanding the waiver he had previously signed, he had a constitutional privilege not to testify unless immunity from prosecution was expressly conferred. He was then asked the following question which he refused to answer on the aforesaid ground:

Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York?

Petitioner thereafter was directed by a judge of the State Supreme Court to answer the question and warned of the consequences if he persisted in invoking his purported federal constitutional privilege not to testify. Stevens remained steadfast in his refusal and was adjudged in criminal contempt.

While a review of this contempt citation was pending in the state courts but after expiration of the 30-day prison sentence,² Stevens was again subpoenaed on September 28,

² While serving his 30-day sentence, Stevens applied to the United States District Court for a writ of habeas corpus, claiming that his privilege against self-incrimination and right to counsel had been abridged in the state court proceedings. Judge Herlands denied the petition, noting that an Article 78 proceeding in the nature of an appeal, New York Civil Practice Law and Rules §7801, was then pending before the Appellate Division and, therefore, Stevens had not met the general requirement, 28 U. S. C. §2254, that available state remedies be exhausted before invoking federal habeas corpus.

1964, to reappear for the third time before the same First June 1964 Grand Jury. Once more the question regarding receipt of payments from gamblers was posed and again petitioner persevered in his refusal to respond. This contumacious conduct led to a second judgment of criminal contempt, imposed by another judge of the State Supreme Court.³

During the period when petitioner was serving his second 30-day contempt sentence, the Appellate Division of the Supreme Court dismissed his petition seeking to annul the first judge's adjudication of contempt. *Stevens v. Marks*, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1964). The Court, citing the Supreme Court's decision in *Regan v. New York, supra*, held that Stevens' challenge to the validity or effectiveness of the waiver of immunity, although available as a defense in any subsequent prosecution which might arise from the grand jury probe, was not a sufficient justification for refusing to testify at this preliminary stage in the proceedings.

After Stevens completed serving the second sentence and while his motion for leave to appeal from the Appellate Division's adverse decision was pending before the New York Court of Appeals, he was subpoenaed, on January 15, 1965, to appear for the fourth time before the First June 1964 Grand Jury. He continued to persist in his refusal to testify, both before that body and in the

³ Instead of taking advantage of the five days afforded to apply to the Appellate Division of the State Supreme Court for a stay of execution of the second contempt conviction pending appeal, Stevens sought to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443. Judge MacMahon vacated and dismissed the removal petition, indicating that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance. He noted, moreover that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right.

face of the judge's new direction. Accordingly, Stevens was adjudged guilty of criminal contempt for the third time and once more sentenced to 30 days' imprisonment, a \$250 fine and in default thereof an additional prison term of 30 days. When the New York Court of Appeals subsequently denied leave to appeal from the judgment dismissing the petition to set aside the first adjudication of contempt,⁴ Stevens—who was then in civil prison—filed his present petition for a writ of habeas corpus. Judge Weinfeld denied federal relief, but thereafter issued a certificate of probable cause and released petitioner on his own recognizance pending this expedited appeal.

I.

Initially, we note that by testing his first conviction in the state courts—raising basically the same issues now presented⁵—Stevens satisfied the predicate for federal habeas corpus review of his third conviction. The requirement that presently available state remedies with respect to the third conviction be exhausted does not apply where, as here, "circumstances [render] such process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. To

⁴ An Article 78 proceeding by which Stevens seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal, is currently pending in the state courts. The Corporation Counsel's answer includes an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged.

⁵ Stevens does claim, for the first time in this petition, that the third conviction subjects him to double jeopardy. But this contention was neither briefed nor argued here and, more important, never presented to the state courts for consideration. Insofar as the present petition is based on this claim, we hold that it is premature for failure to exhaust presently available state remedies. 28 U. S. C. §2254; *United States ex rel. Tangredi v. Wallack*, ____ F. 2d ____ (2 Cir. April 1, 1965); *United States ex rel. Bagley v. LaVallee*, 332 F. 2d 890, 892 (2 Cir. 1964).

require a needless, purely formal application for state court relief each time Stevens is adjudged in contempt for not answering the identical question would, as the District Court noted, "not only confine [petitioner] to a revolving door process leading nowhere, but 'invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.' "

The District Court did, however, in the exercise of its discretion, deny relief because at that time Stevens could still seek Supreme Court review, by direct appeal or certiorari, of the first conviction. It is not necessary for us to pass on the propriety of that ground for decision. On the last day possible Stevens successfully applied to Circuit Justice Harlan for an extension of time in which to file a petition for a writ of certiorari. But since this appeal has not been withdrawn and our resolution of the Constitutional issues might be of some assistance to the Supreme Court, to which these same issues will be presented in the certiorari application on the first conviction, we deem it appropriate to turn to the merits, a procedure dictated by sound considerations of judicial administration and the course of state litigation on the original conviction, which is in no way antithetical to the needs of comity in our delicately balanced federal system.

II.

The basic and crucial attack by Stevens on all the contempt convictions is grounded on his contention that he could not constitutionally be obligated to testify before a grand jury without an express grant of immunity from prosecution. He brushes aside the effect of the limited waiver of immunity, claiming that his privilege against self-incrimination and right to counsel were infringed when, under the compulsion of New York law and without

the benefit of proper legal advice, he executed the waiver in order to save his job.

But these contentions are, if we are to harmonize our holding with *Regan v. New York, supra*, prematurely advanced and cannot excuse Stevens' contumacious refusal, after repeated judicial directions, to cooperate with the grand jury. The facts of *Regan*—not significantly distinguishable from the instant case—deserve brief mention. *Regan*, also a member of the New York City Police Department, was summoned before a grand jury investigating the alleged association of municipal policemen with criminals, racketeers, and gamblers. At first, he too executed a waiver of immunity, but later—after his employment with the police department had been severed—reconsidered his original waiver and refused to answer the grand jury questions, claiming that the waiver was obtained by a “pattern of duress and lack of understanding.” The Supreme Court upheld his conviction for criminal contempt, noting that the validity *vel non* of the waiver was “irrelevant” because, given a valid state immunity statute, there was no possible justification for not testifying.

That holding—its force unimpaired by intervening decisions—is dispositive of Stevens’ claims. Justice Reed’s exposition of the decision’s rationale is significant: “The invalidity of the waver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify.” 349 U. S. at 64. Indeed, if Stevens’ waiver is defective because he should have had the advice of counsel before signing the instrument, or his federal constitutional rights were abridged by the state requirement that he sign a waiver to preserve his public office, or if he should have been permitted to withdraw the waiver, even then, as we

view the relevant provisions of the state penal law, immunity from prosecution will automatically follow.⁶

The question before us is, therefore, a narrow one: Should a witness be permitted to test the validity of a waiver of immunity prior to testifying before the grand jury? We hold that the resolution of any challenge to the waiver must abide the state's subsequent prosecution on the basis of the allegedly compelled testimony, if in fact that course is ever taken by the state. Although we recognize that the grand jury witness is thus placed in a quandary because he is not sure of the status of his waiver, this incertitude cannot bar the state from obtaining his testimony. "[T]he Constitution does not require," the Supreme Court has told us, "the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction... The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan v. New York*, 349 U. S. at 64.

⁶ The New York Penal Law §381(2) provides: "In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Section 2447(1) of the Penal Law provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein."

Furthermore, we do not regard *Regan* as having been weakened, much less *sub silentio* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964), which applied the Fifth Amendment's privilege against self-incrimination to the states via the Fourteenth Amendment due process clause. As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings. Moreover, *Malloy's* relevance is limited; if Stevens is eventually prosecuted, he can, relying on that decision, question the validity of his alleged waiver of the privilege against self-incrimination, urging as he does now that he was compelled to testify or forfeit his public employment by an unconstitutional state law. But see *Slochower v. Board of Higher Education*, 350 U. S. 551, 558 (1956); *Garner v. Board of Public Works*, 341 U. S. 716 (1951); *United States ex rel. Carthan v. Sheriff*, 330 F. 2d 100 (2 Cir.), cert. denied, 379 U. S. 929 (1964). Chief Justice Warren foresaw the availability of the point upon a subsequent prosecution based upon the allegedly compelled testimony, when he wrote, in his separate concurrence in *Regan*, that "substantial federal questions may arise if the petitioner is again called upon to testify concerning bribery on the police force while he was an officer and if he is thereafter denied immunity as to any offenses related to the investigation." (349 U. S. at 65 (emphasis added).) We are not aware that it has ever been held that the privilege conferred by the self-incrimination clause of the Constitution creates an absolute right to remain silent under all circumstances in the face of a valid inquiry into official misconduct; rather, it is a shield which protects a witness from being compelled to give testimony which could be used against him in a criminal proceeding flowing from the grand jury testimony. See *Feldman v. United States*, 322 U. S. 487, 499 (1943).

Finally, we note that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964). Because New York's immunity statute is adequate on its face, we do not believe that Stevens had any constitutional right to refuse to testify before the grand jury. His contempt convictions, therefore, were proper.

Affirmed.

New York State Constitution, Article 1, Section 6

§ 6. [Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of

any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York City Charter, Section 1123

§ 1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its terri-

torial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former § 903.*)

Waiver of Immunity

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JOHN DOE, et al.

I, Lt. James T. Stevens, residing at 164 Engert Ave. Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomina-

tion, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

JAMES T. STEVENS

Witness:

JEROME P. CRAIG

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON,
Notary Public,
State of New York,

No. 03-4309493,
Qualified in Bronx County,
Certificate filed in New York County
Commission Expires March 30, 1965.

**Order of Court of Appeals of the State of New York,
Denying Leave to Appeal**

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of February A. D. 1965.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

1

Mo. No. 56

—o—

In the Matter of the Application

of

JAMES T. STEVENS,

Appellant,

AGAINST

THE HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York,
Respondent.

To review and annul &c.

—o—

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL]

RAYMOND J. CANNON

Clerk

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of October, 1964.

Present—HON. CHARLES D. BREITEL,
Presiding Justice

" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" EARLE C. BASTOW,
Justices

7909

—0—

In the Matter of the Application

of

JAMES T. STEVENS,

Petitioner,

For an order pursuant to Section 7801 of the
Civil Practice Law and Rules, etc.,

vs.

HONORABLE CHARLES MARKS, Justice of the Supreme Court
of the State of New York,
Respondent.

—0—

The above-named petitioner, James T. Stevens, having presented a petition, verified the 28th day of August, 1964, praying for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 762 of the Judiciary Law, annulling the order of mandate dated July 30, 1964, and remitting the \$250. fine paid by petitioner; and for other relief,

And Hon. Frank S. Hogan, District Attorney, New York County having filed and served upon the petitioner on the 5th day of October, 1964, a notice of motion, pursuant to Section 7804(f) of the Civil Practice Law and Rules, to dismiss the petition herein as a matter of law; and said proceeding having duly come on to be heard before this Court on the 6th day of October, 1964.

Now, upon reading and filing the notice of application, dated September 28, 1964, with proof of due service thereof, the petition of James T. Stevens, duly verified the 28th day of August, 1964, and the affidavit of John P. Schofield, duly sworn to the 6th day of October, 1964, all read in support of the petition, and the notice of motion to dismiss the petition dated October 5, 1964, by Hon. Frank S. Hogan, District Attorney, New York County, with proof of due service thereof, and the affidavit of Michael R. Stack, Assistant District Attorney, duly sworn to on the 5th day of October, 1964, all read in opposition to the application of the petitioner and in support of the motion to dismiss the petition; and after hearing Mr. John P. Schofield in support of the petition and in opposition to the motion to dismiss the petition, and Hon. Frank S. Hogan, District Attorney, New York County, in opposition to the application of the petitioner, and in support of the motion to dismiss the petition; and due deliberation having been had thereon; and upon the memorandum decision of the Court filed herein,

It is unanimously ordered that the motion of Hon. Frank S. Hogan, District Attorney, New York County, to dismiss the petition as a matter of law, be and the same hereby is granted and the proceeding be and the same hereby is unanimously dismissed, without costs.

Enter:

VINCENT A. MASSI,
Clerk

FILED

JUN 14 19

IN THE

JOHN F. DAVIS, C.

Supreme Court of the United States

October Term, 1964

No. **210**

JAMES T. STEVENS,

Petitioner,
against

Honorable CHARLES A. MARKS, Justice of the
Supreme Court of New York, County of New York,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States
October Term, 1964

No.



JAMES T. STEVENS,

Petitioner,
against

Honorable CHARLES A. MARKS, Justice of the
Supreme Court of New York, County of New York,
Respondent.



**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—
Statement

This is a petition for writ of certiorari to the New York Supreme Court, Appellate Division, First Department, to review a decision of that court, rendered October 30, 1964, unanimously affirming, with an opinion, the order of mandate dated July 30, 1964, adjudging petitioner to be guilty of contempt of court. Leave to appeal to the New York Court of Appeals was denied on February 4, 1965 by Chief Judge Charles S. Desmond.

Introduction

On June 26, 1964, the petitioner, a lieutenant in the New York City Police Department, executed a limited waiver of immunity. Thereafter, he refused to give testimony before a grand jury pursuant to that waiver, and was, consequently, held in contempt of court despite his plea that the waiver was constitutionally defective.

Circuit Judge Irving R. Kaufman in an opinion affirming the District Court's dismissal of petitioner's writ of habeas corpus describes in detail both the events leading up to the citation for contempt, as well as the later fruitless attempts by petitioner in both federal and state court to have that conviction set aside.

That part of the opinion adverting to the facts of the case is to be found at pages 35 through 39 of the printed petition.

Question Presented

Is the alleged invalidity of a waiver of immunity against prosecution signed by a witness, a legal defense to a criminal contempt prosecution for refusal to testify before a grand jury?

POINT I

The order adjudging petitioner to be in contempt of court deprived him of no constitutionally protected right [answering petitioner's brief].

Petitioner claims that a waiver of immunity executed by him is invalid because he was coerced into signing it by the threat of loss of his job if he refused to so sign, and further that it had been obtained from him without his being advised that he was entitled to consult with counsel prior to its execution. Thus, petitioner asserts, since the waiver was invalid he had every right to interpose his Fifth Amendment privilege and to remain silent in the face of the official inquiry, and his conviction for contempt of court for so doing was unconstitutional.

However, a 1955 decision of this Court, *Regan v. New York*, 349 U. S. 58, held that the purported invalidity of a waiver of immunity (whatever the reason ascribed for its being defective) is no defense to a criminal contempt prosecution for refusal to testify before a grand jury. But, the case went on to hold, the waiver's invalidity (if it is indeed invalid) is a complete defense to any subsequent prosecution which might arise as a result of disclosures made by the witness concerning any crimes committed by him. Hence, the correct procedure is that a witness, situated as is Stevens, should make the appropriate objection and then testify as directed. Should he thereafter be indicted as a result of his testimony he can at that time interpose his objection on constitutional grounds. There is, of course, a statute in New York which provides that testi-

mony relating to bribery cannot be withheld on the ground of self-incrimination, but which automatically confers immunity from prosecution for any criminal activity revealed in such testimony [New York Penal Law §§381, 2447].

This principle, and the ramifications flowing therefrom, have been thoroughly explored by the following Courts: the Appellate Division, First Department of the New York Supreme Court; Judge Weinfeld in a District Court opinion; and Circuit Judge Kaufman writing for the United States Court of Appeals, 2nd Circuit.

As there is little that can be added to these three opinions, which exhaustively treat both the federal and state aspects of the case, we respectfully adopt the reasoning and conclusions of those opinions, which are contained in the petition for certiorari at pages 25-44, and which, it is submitted, persuasively argue for the conclusion herein urged.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York County

H. RICHARD UVILLER
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June, 1965

IN THE

FILE

NOV 4

JOHN F. DAVIS,

Supreme Court of the United States
October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

against

Honorable CHARLES A. MARKS, Justice of the
Supreme Court of New York, County of New York,
Respondent.

No. 290

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention
by JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent.

MOTION FOR RECONSIDERATION
OF CERTIORARI

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IN THE
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No. 210

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Respondent.

**MOTION FOR RECONSIDERATION
OF CERTIORARI**

Statement

This is a motion for reconsideration of two orders of this Court, entered October 11, 1965, granting the petitioner's applications for certiorari, limited to the first question presented in his petitions, to wit:

"Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The basis for the present motion is that the question has not been passed upon by the courts below.

Argument

The petition for certiorari here calls into question the constitutionality of a provision of the Constitution of the State of New York and a provision of the Charter of the City of New York. The challenge to these provisions was previously made on appeal from the petitioner's conviction to the appellate courts of the State of New York and, on habeas corpus, to the Federal District Court and Court of Appeals for the Second Circuit. None of these tribunals, however, reached or passed upon the merits of the challenge, for the courts below considered themselves bound by the holding of this Court in *Regan v. New York*, 349 U. S. 58 (1955). That case, factually indistinguishable from the present one, likewise declined to reach the merits, deeming such a determination procedurally premature.

In opposing the petition for certiorari in the present case, the People, after restating the question presented, referred to and relied upon the opinions below, which we

believed clearly revealed the limited grounds upon which this cause was decided below. It was perhaps an oversight in the People's original opposition brief that we failed to underline the fact that the question posed in the petition is not ripe for review by this Court at the present stage of proceedings. It is to remedy this neglect on our part, as well as to forestall needless argument, that we now respectfully move for reconsideration.

It seems highly dubious that this Court intended to constitute itself a forum of first instance to consider so vital a question as the constitutionality of a provision of the State Constitution of New York and the parallel provision in the New York City Charter. This appears particularly doubtful where the courts below specifically restrained themselves from reaching the issue on the authority of a holding of this Court. It may be that this Court, by its grant of certiorari, signified its readiness to reconsider the controlling effect of *Regan* today, perhaps in the light of subsequent holdings on the applicability of the Fifth Amendment to state proceedings [*Malloy v. Hogan*, 378 U. S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964)]. But if so, that question was not presented in the petition, and certiorari was explicitly granted on a quite different issue. Or the Court, by its order, may have ruled, *sub silentio*, that the procedural doctrine of *Regan* is no longer operable. But if that be so, then it would seem that the appropriate disposition would be to remand the matter to the state courts for a ruling upon the merits. For the courts of New York have not yet had the opportunity to consider the claim of unconstitutionality. Nor would such a remand be an idle procedural gesture.

The New York courts may invalidate the provisions in question, after considering recent holdings of this Court, or they may so interpret the provisions as to obviate the major constitutional arguments leveled against them. For example, the dismissal feature may be construed to contemplate an optional departmental determination, in which the public officer's failure to testify under a waiver of immunity could be considered on the question of fitness with opportunities to explain consistent with due process.

That both courts below to whom certiorari was directed decided the issue exclusively on the strength of *Regan v. New York* (*supra*) and never reached the question upon which certiorari was granted is clear from relevant portions of their opinions. The Appellate Division of the New York Supreme Court, First Department (22 App. Div. 2d 683) wrote:

"In view of our conclusion that *Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory [sic] v. Hogan*, 378 U. S. 1, and *Escobedo v. Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position."

Judge WEINFELD, writing for the United States District Court for the Southern District of New York, stated:

"Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim."

Judge WEINFELD was also referring to *Regan v. New York*. Judge KAUFMAN, writing for the United States Circuit Court for the Second Circuit, noted that he did not regard *Regan* "as having been weakened, much less *sub silentio* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964)." The court noted as "significant" Justice REED's "exposition of the decision's rationale in *Regan*": "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify" (349 U. S. at 64). "That holding," the Second Circuit went on to say, "its force unimpaired by intervening decisions, is dispositive of Stevens' claims."

To invoke certiorari jurisdiction, a federal issue must be drawn in question by the state court decision upon which review is sought. This tenet is so basic and virtually self-evident that extensive recourse to authorities is perhaps unnecessary. Nonetheless, several cases in this Court deserve mention. In *Musser v. Utah*, 333 U. S. 95 (1948), the Court, after discovering on oral argument a possible defect of vagueness in a state statute, remanded the matter for state consideration of the issue, declaring, "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." (*Id.*, at p. 98.) In *Adler v. Board of Education*, 342 U. S. 485, 496 (1952), the appellants in this Court urged for the first time that the state statute was unconstitutionally vague. The Court replied simply, "The question is not before us. We will not pass upon the constitutionality of a state statute before

the state courts have had an opportunity to do so [citations omitted].” A footnote to Mr. Justice CLARK’s opinion in *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956), note 2 at p. 555, explains that probable jurisdiction there was noted only after the New York Court of Appeals amended its remittitur to state that a federal question had been presented and passed upon [*Daniman v. Board of Education*, 307 N. Y. 806 (1954)]. In companion cases involving the same issue, this Court granted a motion to dismiss the appeal “for want of a properly presented federal question” in view of the New York Court of Appeals refusal to similarly amend the remittitur as to those defendants [*Daniman v. Board of Education*, 307 N. Y. 806 (1954), 348 U. S. 933 (1955)].

Nor is the discretionary “doctrine of abstention” relevant here [see, generally, *Baggett v. Bullitt*, 377 U. S. 360 (1964); *Dombrowski v. Pfister*, — U. S. —, 85 S. Ct. 1116 (April 26, 1965); *Harmon v. Forssenius*, — U. S. —, 85 S. Ct. 1177 (April 27, 1965)]. No original federal jurisdiction is here claimed. Hence, we do not predicate our motion on the claim that the lower federal courts, in their discretion, properly abstained from consideration of the validity of the state law. Those courts declined to reach the merits for an entirely different reason: they were bound to reject the claim as procedurally immature. And, equally obviously, we do not move that this Court “abstain” from reaching the merits on the certiorari issued to the state appellate court. Rather we argue that the merits have not been properly drawn in question by the order below. Nor could it have been in the light of *Regan v. New York (supra)*.

Conclusion

In sum, if the Court intended to bring up for reconsideration the holding of *Regan v. New York, supra*, upon which all lower courts relied, the question should be appropriately amended, notwithstanding the failure of the petition to present that question. If, contrary to Judge KAUFMAN's view below, the Court deems *Regan* no longer controlling, then the order granting certiorari should be amended to delete the question and forthwith remand the matter to the Appellate Division of the New York Supreme Court for consideration of the merits of the question presented in the petition for certiorari. A proper regard for the federal relationship, as well as practical considerations, counsel a determination of the constitutionality of the state provisions by the state courts before consideration of the issue by this Court. Finally, if the Court intended neither of the above results, it is urged, certiorari should be dismissed as improvidently granted.

WHEREFORE, the People respectfully pray for reconsideration of the petition for certiorari and for such other and further relief as may be just and appropriate in the circumstances.

No previous application for the relief herein sought has been made.

Respectfully submitted,

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November, 1965



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner*,

v.

CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York, *Respondent*.

On Writ of Certiorari to the Appellate Division of the Supreme Court,
First Judicial Department in the County of New York

No. 290

JAMES T. STEVENS, *Petitioner*,

v.

JOHN J. McCLOSKEY, Sheriff of New York City, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

In No. 210, the opinion of the Appellate Division, First Judicial Department, of the Supreme Court of New York is reported at 22 App. Div. 683, 253 N.Y.S. 2d 401. See 210

R. 40-41.¹ There were no other opinions in the State courts, leave to appeal to the Court of Appeals of New York having been denied by a simple order. 210 R. 56.

In No. 290, the opinion of the United States Court of Appeals for the Second Circuit is reported, *sub nom. United States ex rel. Stevens v. McCloskey*, at 345 F. 2d 305. See 290 R. 54-63. The opinion of the District Court for the Southern District of New York, per District Judge Weinfeld, is reported at 239 F. Supp. 419. See 290 R. 43-50. The opinion of District Judge Herlands of the same District Court, denying an earlier petition for a writ of habeas corpus, is reported at 234 F. Supp. 25. See 290 R. 39-42.

JURISDICTION

In No. 210, the Appellate Division's order was entered on October 30, 1964. 210 R. 40. Chief Judge Desmond of the Court of Appeals of New York on February 4, 1965, signed an order denying leave to petitioner to appeal to that Court. See 210 R. 56. On timely application, Mr. Justice Harlan on May 5, 1965, signed an order extending the time for filing a petition for writ of certiorari to and including June 3, 1965. See 210 R. 57. The petition for writ of certiorari was filed on June 3, 1965, and was granted by this Court on October 11, 1965, limited to the first question presented in the petition. See 210 R. 57-58. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1257(3).

In No. 290, the opinion and judgment of the Court of Appeals for the Second Circuit were entered on May 11, 1965. See 290 R. 63-64. The petition for writ of certiorari

¹ The references to the printed records in these two consolidated cases appear herein as follows:

The references to the record in No. 210, *Stevens v. Marks*, appear as 210 R. —. The references to the record in No. 290, *Stevens v. McCloskey*, appear as 290 R. —.

was filed on June 25, 1965, and was granted by the Court on October 11, 1965. See 290 R. 65. The grant of certiorari was limited to the first question presented in the petition and the case was consolidated for argument with No. 210. The jurisdiction of this Court to review the judgment below is premised on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This Court has limited its review of the judgments below to the first question presented in the respective petitions, a question which is common to both cases:

Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV, Section 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article 1, Section 6 [McKinney's Consolidated Laws of New York Annotated, Book

2, Part 1, Constitution, p. 89 of 1965 pocket supplement], reads in pertinent part:

No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty, or property without due process of law.

New York City Charter, Section 1123 [New York City Charter and Code, Vol. 1, p. 307, 1963 ed., Williams Press, Inc.] :

§ 1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any

county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former § 903.*)

STATEMENT

A. The Basic Facts

The facts involved in these two cases are identical and undisputed. In summary fashion, they may be stated as follows:

The petitioner herein, James T. Stevens, was a lieutenant with the New York City Police Department. Prior to his summary discharge on July 16, 1964, he had completed 18 years of service and needed only two more years of service to be eligible for retirement. 210 R. 4.

In June of 1964 a grand jury investigation was initiated in New York County with reference to alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Petitioner was among those policemen who were included as subjects of this inquiry. And on five separate occasions, petitioner was called upon to testify before a grand jury in this connection.

(1) **June 26, 1964.** That morning, upon reporting as directed to the office of the Deputy Chief Inspector of the Police Department, petitioner was given a subpoena to report immediately to the New York County Grand Jury—known as First June 1964 Grand Jury. A superior officer was assigned to take him to the grand jury. Outside the

grand jury room and without counsel, petitioner was advised by an Assistant District Attorney to sign a limited waiver of immunity; otherwise, said the Assistant District Attorney, petitioner would be subject to removal from office pursuant to the state constitution and the city charter. 210 R. 3; 290 R. 2-3. Petitioner thereupon signed the waiver before witnesses, a waiver which read in pertinent part (210 R. 20; 290 R. 23) that he waived:

" . . . all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the . . . official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

Petitioner then went before the grand jury, his appearance being designated as an unsworn witness. 210 R. 9. At the outset, petitioner made the following responses to questions by the Assistant District Attorney (210 R. 9-10; 290 R. 25-26):

Q. Lieutenant . . . Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

A. I do.

Q. Do you understand that under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you; do you understand that?

A. I do.

Q. Do you understand further that under the New York State Constitution, the New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?

A. I am.

The petitioner was thereupon duly sworn as a witness and proceeded to answer a few perfunctory questions. He gave no relevant testimony other than to give his name, rank, and command. He acknowledged that he had signed the waiver in the presence of a notary and understood its import. Upon being given a financial questionnaire, petitioner was dismissed with instructions to return to the grand jury on July 1 with the questionnaire completed. 210 R. 10-11; 290 R. 27.

(2) July 15, 1964. Petitioner, having been duly subpoenaed, appeared on July 15, 1964, before another grand jury—known as the Third July 1964 Grand Jury. This time he was represented and advised by counsel. Upon his appearance before the grand jury, he declined to sign a

limited waiver of immunity as offered by an Assistant District Attorney. 210 R. 13; 290 R. 29. Following this refusal, the petitioner and the Assistant District Attorney engaged in this colloquy (210 R. 13-15; 290 R. 29-31):

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official conduct or to the performance of your official duties, you understand that?

A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination?

A. Right, sir.

Q. That you can invoke at any time?

A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer?

A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter?

A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that?

A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and

upon his advice, he advised me to withdraw my partial waiver of immunity.

Q. You mean your limited waiver of immunity?

A. Partial or limited, yes sir, whichever.

Q. Well, now do I take it then that you have no intention to give testimony before the First June Grand Jury?

A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions?

A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify?

A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that?

A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the constitution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right?

A. I do. I've been advised by my counsel now.

Q. You refuse to do so?

A. I do so, yes.

Mr. Scotti: You're excused.

The following day, July 16, petitioner received a letter dated July 15, 1964, from the Chief Clerk of the Police Department informing him (210 R. 21):

" . . . that you having appeared before the Third July, 1964 Grand Jury of the County of New York, on the 15th day of July, 1964, and having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter, the Police Commissioner has ordered that your employment as a member of the Police Department of the City of New York be terminated, and your office vacated."

(3) July 22, 1964. On this date petitioner was summoned to reappear before the First June 1964 Grand Jury, before whom the petitioner had appeared immediately after execution of the waiver of immunity on June 26. But this time he refused to answer any questions on the basis of his state and federal constitutional rights. See 210 R. 15-16; 290 R. 31-32. In particular, he refused on these grounds to answer the following incriminating question:

"Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Laws of the State of New York; did you?"

Immediately following this refusal to answer, petitioner was taken before Judge Charles A. Marks of the State Supreme Court. The judge directed him to answer the above-quoted question but petitioner declined to do so in reliance upon his federal constitutional privilege against self-incrimination. See 210 R. 18; 290 R. 34. The judge immediately and summarily found petitioner guilty of criminal contempt of court. About a week later, on July 28, Judge Marks heard arguments by counsel as to the

pertinence and applicability of the federal constitutional privilege against self-incrimination in the light of the facts of this case and with reference to petitioner's refusal to answer the one question asked of him.

At the conclusion of this hearing, which was said to be in the nature of a reargument, Judge Marks adhered to his original decision, stating that "[I] find the witness in criminal contempt of this court, and I fine the witness the sum of \$250 and thirty days in the Civil Jail of the City of New York." 210 R. 37. It is that conviction which forms the basis of the subsequent appeal in the state courts and which is now before this Court in No. 210.

(4) **September 28, 1964.** While review of the foregoing contempt conviction was still pending, petitioner was again subpoenaed on September 28, 1964, to reappear for the third time before the same First June 1964 Grand Jury. Once again the question regarding receipt of payment from gamblers was put to him and once again petitioner declined to answer, claiming his federal privilege. He was forthwith brought before Judge Schweitzer of the State Supreme Court. And upon his continued refusal to answer the question, when directed to do so by the judge, petitioner was held in contempt of court. And he again was fined \$250 and sentenced to imprisonment for thirty days. See 210 R. 51; 290 R. 1, 11, 45-46, 57.

(5) **January 11, 1965.** On this date petitioner once more appeared, in response to a new subpoena, before the First June 1964 Grand Jury. At that appearance, petitioner did respond to questions about the prior proceedings but declined again to answer the incriminating question concerning the receipt of money from gamblers; the refusal was explicitly premised on "my rights under the fifth, sixth and fourteenth amendments of the Constitution." See 290 R. 16-17.

During the course of this grand jury hearing, the Assistant District Attorney made it clear in his questions to

petitioner that it had been explained to petitioner at the time of his first appearance on June 26, 1964, that: (1) under the federal Constitution he had a right to refuse to answer any questions that might tend to incriminate him; (2) under the New York State Constitution and the New York City Charter a person who desires to continue in public office is required to sign a limited waiver of immunity; (3) if he failed to sign a limited waiver of immunity he could lose his job; and (4) if he signed such a waiver, what he said would be taken down and could be used against him if an indictment were returned. 290 R. 13-14. The Assistant District Attorney further made it plain that (290 R. 16)

“ . . . regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity.”

Upon his refusal to answer the incriminating question, petitioner was immediately taken before Judge Schweitzer again. There he declined, on federal constitutional grounds, to obey the court's direction to answer the question. 290 R. 21. The judge's immediate response was to adjudge petitioner in contempt, to fine him \$250 and to sentence him to thirty days' imprisonment. 290 R. 21-22. It is that judgment which formed the basis of petitioner's petition in the federal District Court for a writ of habeas corpus and which is now before this Court in No. 290.

B. The Legal Proceedings

(1) The appeal from the first contempt conviction. Following the imposition on June 28, 1964, by Judge Marks of the \$250 fine and the thirty-day imprisonment sentence, petitioner immediately appealed to the Appellate Division of the Supreme Court, First Judicial Department. An application to stay execution of the sentence pending the appeal was denied, 290 R. 40, but oral argument on the

appeal was advanced to September 9, 1964. The petitioner served his term of imprisonment from August 5 to September 4, 1964, and paid the \$250 fine. 290 R. 40.

While serving his jail sentence, petitioner applied to the federal District Court for a writ of habeas corpus. This application was denied by Judge Herlands on August 14, 1964, for "three interrelated reasons." See 290 R. 39-42. These reasons were: (1) the pendency of the appeal before the Appellate Division; (2) the lack of any extraordinary reason for dispensing with the general requirement that state remedies be exhausted before invoking federal habeas corpus; and (3) the presence of "novel and far-ranging constitutional questions posed by the petitioner" that would require extensive research and mature deliberation and that could probably be determined by the New York appellate courts.

Later, on October 30, 1964, the Appellate Division dismissed the appeal, which was in the form of a petition to annul the lower court's mandate and to remit the \$250 fine. See 210 R. 40-43; 290 R. 36-38. The court's memorandum decision stated that the contempt adjudication must be sustained on the authority of *Regan v. New York*, 349 U.S. 58. The court felt, as a consequence, that the effect of *Malloy v. Hogan*, 378 U.S. 1, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter need not be reached; that problem would become pertinent, said the court, only if and when petitioner testified and it must be determined whether he has accordingly received immunity or has effectively waived it. 210 R. 43; 290 R. 38. Leave to appeal this decision to the Court of Appeals of New York was denied. 210 R. 55. And this is the matter now before this Court in No. 210.

(2) The federal habeas corpus proceeding. Prior to surrendering for execution of the imprisonment judgment

for the second contempt conviction, petitioner sought to remove the contempt proceedings to the federal District Court pursuant to 28 U.S.C. § 1443. District Judge MacMahon on October 20, 1964, vacated and dismissed the removal petition. As later noted by the Court of Appeals for the Second Circuit, 290 R. 57-58, n. 3, Judge MacMahon indicated "that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance" and further indicated "that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right."

In the meantime, the five-day stay of execution afforded petitioner to appeal the second contempt conviction expired and petitioner was forced to serve his second thirty-day sentence and to pay the \$250 fine. No formal appeal was taken from this judgment of conviction. It was while he was serving this second jail term that the Appellate Division dismissed the petition seeking to annul the first contempt adjudication.

After the petitioner completed service of the second sentence and while leave to appeal the Appellate Division's judgment to the New York Court of Appeals was under consideration, petitioner was forced to appear on January 11, 1965, for the fourth time before the First June 1964 Grand Jury—resulting in another contempt conviction, a thirty-day jail sentence, and a \$250 fine. While serving this new jail term, petitioner on February 8, 1965, filed the present petition for a writ of habeas corpus in the federal District Court, a petition which challenged the constitutional validity of this last of the contempt convictions. See 290 R. 1-5.

To prevent expiration of petitioner's sentence pending decision on the habeas corpus application, the District Court issued a writ pursuant to which petitioner was

brought into federal custody and, without opposition, released on his own recognizance. 290 R. 44, n. 1. Later, the District Court, after a hearing, dismissed the writ of habeas corpus. 290 R. 44-50. While holding that the circumstances were such as to justify the seeking of federal relief at this juncture, the court concluded that the decision in *Regan v. New York*, 349 U.S. 58, was dispositive of petitioner's claims. Unless *Regan* were to be overruled, said the court, resolution of those constitutional contentions "must await an attempt to prosecute him on the basis of the compelled testimony, or an adjudication with respect to his employment rights." 290 R. 50.

The District Court then certified that there was probable cause for an appeal, 290 R. 52, and the Court of Appeals for the Second Circuit quickly ordered that petitioner be continued at large on his own recognizance pending the hearing and determination of an expedited appeal. 290 R. 53. That appeal resulted in the opinion of May 11, 1965, affirming the action of the District Court with respect to the habeas corpus petition. 290 R. 54-63. The Court of Appeals was of the belief, shared by the other courts that had considered petitioner's federal constitutional questions, that the decision in *Regan v. New York*, 349 U.S. 58, was controlling, making premature petitioner's constitutional attacks on the validity of Article 1, Section 6, of the New York State Constitution and of Section 1123 of the New York City Charter. That is the decision now under review by this Court in No. 290.

(3) The state court review of petitioner's summary dismissal. Finally, it should be noted that petitioner has initiated, under Article 78 of the New York Civil Practice Law and Rules², a proceeding to obtain review of the sum-

² See Article 78, § 7801, et seq. [McKinney's Consolidated Laws of New York Annotated, Book 7B, Civil Practice, Law and Rules, § 7801, et seq.].

mary dismissal action of the Police Commissioner, dated July 15, 1964. See 290 R. 3. As noted by the Court of Appeals for the Second Circuit, 290 R. 58, n. 4, that proceeding "seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal" and has elicited an answer from the Corporation Counsel of New York City that includes "an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged."

That proceeding is still pending in the State courts and is not involved in either of the two cases now before this Court for review.

SUMMARY OF ARGUMENT

The sole issue as to which certiorari was granted involves the validity, under the United States Constitution, of those provisions of the New York State Constitution (Article 1, Section 6) and of the New York City Charter (Section 1123) which threaten summary forfeiture of employment as to any public employee who seeks to invoke his Fourteenth Amendment privilege against self-incrimination.

This issue is necessarily and properly before this Court despite the fact that the lower courts thought the issue need not be resolved. The lower courts sought to avoid the issue, which had been properly raised before them, by reference to this Court's decision in 1955 in *Regan v. New York*, 349 U.S. 58. The Court there held that the existence of the New York immunity statute removed any possible justification which the petitioner Regan might have had for not testifying in a state grand jury investigation. If, as Regan claimed, the waiver of immunity which he had signed was coerced—and a belated reference was made in that connection to the coercive impact of the provisions of the State Constitution and City Charter here in issue—the statutory immunity was said by this Court to protect

him from prosecution. Hence he could not justify a present refusal to testify, whatever the merits of the claimed coercion.

But there are several vital distinctions between the instant proceedings and those in *Regan*. Most importantly, the entire constitutional climate has changed. The *Regan* case was decided more than nine years prior to *Malloy v. Hogan*, 378 U.S. 1, which for the first time established that the Fourteenth Amendment protects the privilege against self-incrimination against state encroachment. Thus the *Regan* case could not and did not involve any assertion of or penalty on a *federally-protected privilege*, whereas the petitioner here expressly claimed such a privilege in the state grand jury proceedings. The assessment of petitioner's claims, unlike those of *Regan*, must accordingly be viewed with respect to the sanctity of a privilege protected by the United States Constitution. Both substantively and procedurally, federal principles now prevail that were not involved in *Regan*.

Moreover, there are significant factual differences that serve to distinguish the *Regan* decision. The petitioner here was entrapped by the Assistant District Attorney into the belief that, following his signing of a limited waiver of immunity without the advice of counsel, but two choices were before him: (1) he could claim at any time his federal privilege against self-incrimination, in which event he would suffer the employment forfeitures decreed by the State Constitution and the City Charter, or (2) he could waive his immunity and subject himself to possible prosecution based on incriminating answers. Not once was he advised of any possible applicability of the New York immunity statute should he give incriminating answers. Indeed, the Assistant District Attorney made plain the State's position that petitioner had no immunity whatever.

Such a combination of facts constitutes an unconstitutional entrapment as defined in *Raley v. Ohio*, 360 U.S. 423,

and serves to distinguish the *Regan* decision. The essential prop of *Regan* was the existence and applicability of the state immunity statute, which was here impliedly read out of existence so far as these grand jury proceedings were concerned.

Thus it is fair and indeed necessary to consider the merits of the constitutional question as to the validity of the provisions of the State Constitution and City Charter. As to that question, the decision in *Malloy v. Hogan*, 378 U.S. 1, 8, demonstrates the constitutional invalidity of the effort made by these provisions to penalize those public employees seeking to invoke their federally-protected privilege not to incriminate themselves. The *Malloy* decision made plain that (1) an individual may waive the privilege and choose to speak "in the unfettered exercise of his own will" and (2) if he chooses to remain silent he shall "suffer no penalty . . . for such silence." The provisions in question violate both those principles.

The State Constitution and the City Charter compel the employee—by force of the threat of job forfeiture—to waive his federal privilege against self-incrimination. Failure to waive immunity and insistence upon invoking the privilege mean automatic and summary dismissal and future disqualification for employment. Such a choice and such a penalty negate the principles expressed in the *Malloy* case. The employee has no unfettered will under these circumstances in determining whether to waive his federal privilege; that is true even as to the employee like petitioner who bends to the pressure and signs a waiver of immunity.

It is no answer that the petitioner may lack any constitutional right to be a policeman. As a public servant, and like any other citizen, he is free to assert the constitutional privilege against self-incrimination without fear or threat of employment forfeiture should he insist upon invoking that privilege.

Whether and to what extent a public servant may be dismissed or disciplined for failing to disclose pertinent information concerning his public duties is not here in issue. The sole questions are whether he can be punished by summary contempt procedure for the very act of exercising a privilege protected by the Fourteenth Amendment and whether a state law that imposes coercion and penalties with respect to that act can withstand constitutional scrutiny. Those questions must be answered in the negative.

ARGUMENT

1. THE ISSUE AS TO THE VALIDITY, UNDER THE FEDERAL CONSTITUTION, OF ARTICLE I SECTION 6, OF THE NEW YORK STATE CONSTITUTION AND SECTION 1123 OF THE NEW YORK CITY CHARTER IS NECESSARILY AND PROPERLY BEFORE THIS COURT FOR DECISION

At all stages of the two proceedings now before this Court petitioner expressly brought into question the federal constitutional validity of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter.³ In petitioner's view, these pro-

³ In No. 210, the state court proceeding, the review petition filed in the Appellate Division made reference (210 R. 5-6) to the argument advanced before Judge Marks (210 R. 30) that the designated provisions of the State constitution and city charter were in violation of the United States Constitution. The memorandum decision of the Appellate Division took note of that contention but thought it need not be resolved (210 R. 43).

In No. 290, the federal habeas corpus proceeding, the habeas corpus petition alleged (290 R. 4) that the District Attorney was "using and abusing" these provisions to deprive him of his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments; the petition further incorporated by reference (290 R. 5, 38, 42) the "novel and far-ranging constitutional issues posed by the petitioner" in the state court proceedings, including the contention that *Malloy v. Hogan*, 378 U.S. 1, rendered unconstitutional the provisions in question (290 R. 38). But the federal courts also thought it unnecessary to resolve that contention (290 R. 61-62).

visions constituted an unreasonable and unconstitutional penalty for asserting his privilege under the Fifth and Fourteenth Amendments not to incriminate himself. As the Assistant District Attorney repeatedly stated (290 R. 7-8, 13-14), petitioner had a federal constitutional privilege not to answer any incriminating question but if he invoked that privilege the state laws in question would operate to forfeit his position as a public officer and to bar him from future employment by the City or State. In these circumstances, petitioner argued, the constitutional validity of imposing such a penalty upon the assertion of a federal constitutional privilege was properly put in issue by a contempt conviction stemming from an attempt to assert that privilege.

But both the state and the federal courts below thought that this contention was premature and need not be resolved. The decision of this Court in 1955 in *Regan v. New York*, 349 U.S. 58, was said to foreclose at this juncture any attempt to question the constitutional validity of this penalty for asserting the privilege. As the lower courts read the *Regan* decision, petitioner was required to answer the incriminating question pursuant to the waiver of immunity and to await a prosecution for an offense based upon an incriminating answer; only then could he test the validity of the waiver or the validity of the penalties contained in Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter.

There are, of course, numerous factual parallels between the *Regan* case and the instant ones. *Regan*, like the petitioner, was a New York City policeman who, prior to being called before a grand jury, signed a waiver of immunity against prosecution.⁴ And, on a subsequent

⁴ Some weeks after he signed the waiver, *Regan's* "connection with the police department was severed." 349 U.S. at 61. But that severance was voluntary on *Regan's* part (R. 122-123, No. 54, 1954 Term), unlike the involuntary dismissal of the petitioner herein.

appearance before the grand jury, he declined to answer a question on the ground that his answer might tend to incriminate him. Upon persisting in his refusal to answer following a court command Regan was indicted for criminal contempt, tried by a jury and convicted.

This Court premised its *Regan* decision on the critical fact that the New York immunity statute⁵ "removed any possible justification which petitioner [Regan] had for not testifying." 349 U.S. at 62. If, as Regan claimed, the waiver of immunity had been illegally coerced, the statutory immunity from prosecution persisted and his refusal to give incriminating testimony was unjustified; on the other hand, if the waiver were valid and voluntary Regan had no cause to object to giving incriminating testimony. Hence, said this Court, the alleged invalidity of the waiver could only be made a defense to a subsequent prosecution based on the incriminating answers, a defense which was irrelevant to the contempt prosecution for refusing to testify at all. 349 U.S. at 64.

A. The constitutional distinctions from the *Regan* case

But the factual, legal and constitutional distinctions between the instant proceedings and those in the *Regan* case are so marked and so consequential as to make the *Regan* ruling inapplicable here. Most significantly, the entire constitutional atmosphere surrounding the *Regan* case has dramatically changed. At the time of that decision in 1955, it was well established that the Fourteenth Amendment did not secure against state invasion the privilege against self-incrimination as guaranteed against

⁵ See § 381(2) and § 2447(1) of the New York Penal Law, quoted in footnote 6 of the opinion of the Court of Appeals for the Second Circuit in No. 290 (290 R. 61). Those sections provide means of granting immunity with respect to incriminating testimony before grand juries investigating alleged bribery of public officials.

federal infringement by the Fifth Amendment. *Twining v. New Jersey*, 211 U.S. 78; *Adamson v. California*, 332 U.S. 46; and see the later decisions in *Knapp v. Schweitzer*, 357 U.S. 371; *Cohen v. Hurley*, 366 U.S. 117. Thus Regan did not and could not claim that his refusal to testify was in any way grounded upon a privilege against self-incrimination as protected by the United States Constitution. Whatever coercion or invalidity that Regan claimed had infected his waiver could in no way create a penalty or burden upon the assertion of a federally-protected privilege.

It was not until more than nine years after the *Regan* decision—indeed, just 11 days prior to this petitioner's first appearance before the grand jury—that this Court announced a new and major development in constitutional law: the holding that “the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.” *Malloy v. Hogan*, 378 U.S. 1, 6; see also *Murphy v. Waterfront Commission*, 378 U.S. 52, and the later decision in *Griffin v. California*, 380 U.S. 609. Thus this petitioner, unlike Regan, was able to and did assert a federally protected privilege against self-incrimination in refusing to answer the incriminating question. And the federal nature of that privilege was fully and consistently recognized by the Assistant District Attorney, such as when he asked the petitioner in the presence of the grand jury whether he understood “that under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you.” 210 R. 9; 290 R. 26.

The significance of this development in constitutional doctrine is not to be minimized in terms of the propriety of questioning, in a criminal contempt prosecution for refusing to answer an incriminating question, a penalty imposed on the assertion of the privilege against self-incrimination. Prior to the decision in *Malloy v. Hogan*,

a defendant could urge only that the proceeding in which he declined to testify, or in which he was convicted of contempt for such refusal, was in some manner so procedurally unfair as to amount to a denial of federal due process. See *Raley v. Ohio*, 360 U.S. 423. He could not assert any privilege under the Fourteenth Amendment not to testify at all. Nor could he claim that any penalties or conditions had been imposed on the invocation of a federal privilege. And the *Regan* decision proves only that it is not *procedurally* unfair, in the Fourteenth Amendment sense, to exclude from consideration in a contempt prosecution any claim of illegality as to a waiver of immunity.

But with the advent of the *Malloy* doctrine the issues have changed and the entire scene has broadened. The States are now on notice not only that they must provide procedural fairness but that, when confronted with a refusal to incriminate oneself, they are dealing with the very substance of a federally-protected privilege. When an individual invokes that federal privilege in a state proceeding, whatever its nature, state authorities must now accord that privilege the full protection and respect given by the Fifth Amendment to the assertion of the privilege in federal proceedings. Thus the principles that have been announced by this Court respecting the constitutional impermissibility of penalizing an individual for asserting the self-incrimination privilege, see, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 91, have become fully relevant to penalties imposed by States upon those invoking the federally-protected privilege in state proceedings.⁶

⁶ Cf. *United States ex rel. Carthan v. Sheriff, City of New York*, 330 F. 2d 100 (C.A. 2), cert. denied, 379 U.S. 929, expressing some doubt about the validity of Section 1123's restriction on the privilege against self-incrimination. The Second Circuit there found that the defendant had voluntarily waived the privilege by disclosing his financial affairs and thus the court felt it unnecessary to rest its decision on the *Regan* decision.

More particularly, when Regan made his belated claim before this Court⁷ that he had been coerced into signing a waiver of immunity by virtue of the New York laws that operated to forfeit his public employment should he fail to sign, such a penalty upon the privilege to remain silent was not a penalty that attached to the assertion of a privilege recognized to be protected by the Fourteenth Amendment.⁸ Not until the change wrought by *Malloy v. Hogan* was it possible to view and assess such a penalty in terms of its impact upon a federally-protected privilege. Then and then only could the New York penalties as such be said to be imbued with Fourteenth Amendment considerations. Whereas prior to *Malloy* they might by operation indirectly result in some procedural unfairness condemned by the Fourteenth Amendment, these penalties after *Malloy* must also be tested in terms of their direct encroachment upon the Fourteenth Amendment privilege to remain silent. Thereby is evident the fundamental in-

⁷ In the *Regan* opinion, 349 U.S. at 63, n. 9, this Court pointed out that Regan's contention that the provisions of the New York Constitution and the City Charter—which were essentially identical to those to which petitioner herein objects—required him to sign the waiver of immunity or lose his job had not been raised at any point in the proceedings below. The contention appeared for the first time in the Petition for Certiorari. Thus, under the rules of this Court, the contention came too late for consideration. See *Adler v. Board of Education*, 342 U.S. 485, 496.

⁸ In *Canteline v. McClellan*, 282 N.Y. 166, 170, 25 N.E. 2d 972, 973, decided in 1940, the New York Court of Appeals viewed the immunity from prosecution as contained in Article 1, Section 6, of the State Constitution as entirely unrelated to any requirement in the United States Constitution and thus "could have been omitted in its entirety from the present Constitution of our State." The decision in *Twining v. New Jersey*, 211 U.S. 78, was cited in support of the quoted remark.

applicability of the *Regan* decision and rationale to the contention now before this Court.⁹

Additionally, of course, since federal standards now govern the assertion of this federal privilege in state proceedings, federal principles also mark the limitations, exclusions, waivers, conditions and penalties that may be attached to such an assertion. See *Malloy v. Hogan, supra*, 7-8; *Murphy v. Waterfront Commission, supra*, 79. Included among the matters thus subject to federal considerations must be the time and the place for raising and resolving claims of unreasonableness and unconstitutionality with respect to state penalties imposed on the invocation of the federal privilege against self-incrimination.

It would follow, under federal standards not applicable at the time of the *Regan* decision to assertions of the privilege in state proceedings, that the propriety of such an assertion may and indeed should be adjudicated when the defendant is prosecuted for contempt for failure to answer a question in reliance on the privilege. From the earliest days, federal contempt proceedings have been the vehicles for determining the nature and scope of the privilege under the Fifth Amendment, the circumstances under which that privilege has been voluntarily waived, and the impact of federal immunity statutes upon assertions of the privilege. See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547; *Brown v. Walker*, 161 U.S. 591; *Ullmann v. United States*, 350 U.S. 422. In none of those situations has this Court imposed any *Regan*-type requirement that the defendant await a prosecution based upon an in-

⁹ While not of critical significance, it should also be noted that *Regan* was convicted of contempt for refusing to answer an incriminating question only after an indictment and a jury trial wherein he was allowed to develop fully his reasons for refusing to answer. See *Regan v. New York*, 349 U.S. at 61. The petitioner herein, however, was convicted summarily by the various state court judges. Compare *Harris v. United States*, 382 U.S. — (No. 6, Oct. Term, 1965, decided Dec. 6, 1965).

erminating answer before alleging that his privilege was not truly waived or that a given statute does not confer adequate immunity. And when the issues as to the nature and propriety of the assertion of the privilege came before the Court in the context of a state contempt proceeding in *Malloy v. Hogan, supra*, no question was raised as to the propriety of utilizing the contempt case as the basis for resolving the issues involved.

Thus, when a defendant has asserted his federal privilege against self-incrimination in the course of state proceedings, the propriety of that assertion and the propriety of any effort to force him to abandon the privilege should be determined upon a contempt prosecution for failure to reply to an incriminating question. That is the forum, that is the time, for considering and resolving the competing interests of the state and the individual. And if the individual's reliance on his federal privilege against self-incrimination be found justified, he avoids the unfair loss of liberty or other penalty attendant upon an unwarranted contempt conviction.

B. The factual distinctions from the Regan case

Moreover, apart from and in addition to the aforementioned federal standards made relevant by the *Malloy* decision, the particular circumstances of this case demand that petitioner be allowed at this juncture to contest the penalties imposed by the State and City on his invocation of the federal privilege. The critical basis of the *Regan* decision was the existence and availability of the New York immunity statute, which was held to remove any possible justification Regan might have had for not testifying. 349 U.S. at 62. But while that immunity statute is still in existence, and more particularly was extant at the time of petitioner's refusals to answer the incriminating question, the entire proceedings below proceeded on a basis that was totally inconsistent with any belief or possibility that the immunity statute would protect

petitioner should he give incriminating answers and should he be correct in his assertion that the State and City had unconstitutionally penalized his invocation of the federal privilege.

Repeatedly and in the presence of the grand jury, the Assistant District Attorney made it plain to petitioner, *who had already signed the limited waiver of immunity before he had had an opportunity to consult counsel*,¹⁰ that as a potential defendant he still had a choice between (1) refusing to answer any question that might tend to incriminate him, in reliance upon the Constitution of the United States, and (2) answering questions concerning the conduct of his office, pursuant to the signed waiver of immunity, and thereby subjecting himself to possible indictment and prosecution on the basis of those answers. 210 R. 9-10, 13-15; 290 R. 25-26, 29-31. Always coupled with the statements of this choice were reminders by the Assistant District Attorney that any refusal to sign the waiver or any invocation of the privilege against self-incrimination would result in a forfeiture of petitioner's position as a public officer by virtue of the provisions of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter. Thus at his initial appearance before the grand jury, without having had the benefit of counsel, petitioner was asked by the Assistant District Attorney if he understood that

(1) ". . . under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you . . .", and

(2) ". . . under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to

¹⁰ The waiver of immunity was limited in the sense that it related only to matters involving petitioner's official duties and conduct in public office; there was no waiver of immunity as to strictly private matters.

sign a limited waiver of immunity . . . that means . . . that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you.” [210 R. 9-10; 290 R. 25-26.]

This choice was reiterated at petitioner's second appearance, the Assistant District Attorney stating in reverse order that:

(1) “. . . under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct,”

(2) “Even though you still have your constitutional privilege against self-incrimination . . . [t]hat you can invoke at any time . . . But if you invoke that privilege you are subject to the forfeiture of your position as a public officer.” [210 R. 13; 290 R. 29.]

And the so-called choice was again repeated to petitioner by the Assistant District Attorney at his last appearance before the grand jury. See 290 R. 13-14.

But not once was petitioner told that if he responded with incriminating answers the state immunity statute could, would or might preclude a prosecution based on such answers. On the contrary, the Assistant District Attorney made it clear (290 R. 14) that

“. . . if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you give could be and will be used against you . . .”

Indeed, the State expressly disavowed any possibility that immunity could attach to petitioner's incriminating answers

when the Assistant District Attorney told petitioner (290 R. 16) that

" . . . regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity . . . "

In such circumstances, the ruling of this Court in *Raley v. Ohio*, 360 U.S. 423, 437-439, becomes highly relevant. There the Court held violative of the Due Process Clause of the Fourteenth Amendment state contempt convictions wherein the defendants had been entrapped by being convicted for exercising a privilege which the state investigating commission had led them to believe was available to them. The commission chairman had affirmatively apprised them that they had a privilege against self-incrimination that they were entitled to exercise and never even suggested the existence or applicability of the Ohio immunity statute; and other members of the commission and its counsel made statements that were totally inconsistent with any belief in the applicability of the state immunity statute. In fact, said this Court (360 U.S. at 438), "it is fair to characterize the whole conduct of the inquiry as to the four as identical with what it would have been if Ohio had had no immunity statute at all."

In *Raley*, as here, the defendants were convicted of contempt because of their refusal to answer relevant questions on the ground of possible self-incrimination. The refusal to answer, based upon the privilege, was said to constitute the offense. And the Ohio Supreme Court had affirmed the *Raley* convictions on the express ground that the state immunity statute was necessarily available and precluded the possibility of justifying a refusal to answer on grounds of self-incrimination. But this Court in *Raley* did not adopt such a *Regan*-type analysis and hold that the availability of the Ohio immunity statute automatically removed any basis for refusing to answer relevant questions.

Instead, the Court pointed to the action of the commission officials as creating "the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him . . . Here there were more than commands simply vague or even contradictory. There was active misleading . . . We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances." 360 U.S. at 438-439.

Likewise, in the instant proceedings petitioner was entrapped into believing that he could at any time, despite his having signed the waiver of immunity, invoke his federal privilege against self-incrimination—as a result of which he stands convicted of three contempts. And he was further entrapped into believing that to maintain his public office he had to sign a waiver of immunity and answer incriminating questions—in which event he would have no immunity from possible prosecution. No slightest suggestion was made that the New York immunity statute existed or might be applicable; the Assistant District Attorney made plain the State's position that petitioner had no possible immunity. It is thus fair, as in *Raley*, to characterize the whole conduct of the grand jury procedure as the one it would have been if New York had had no immunity statute at all.

Thus for practical purposes the essential prop of the *Regan* ruling—the potential availability of the New York immunity statute—is missing here. Petitioner was led to believe that he could invoke his federal privilege against self-incrimination only at the pain of losing his public employment and that he would have no immunity should he sign a waiver and answer incriminating questions. As far as the unannounced possibility of the state immunity statute being applicable was concerned, petitioner was left to the real risk that the state courts would subsequently rule that the immunity statute does not apply in these

circumstances—as the State in effect advised him—and that he could be prosecuted on the basis of any incriminating testimony he might now be compelled to give. Cf. *United States v. Welden*, 377 U.S. 95. Petitioner's fear that state authorities might use the answers against him in a subsequent state prosecution was both understandable and reasonable. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 79-80.

Application of the principles enunciated in *Raley v. Ohio*, *supra*, which was decided subsequently to and without citation of the *Regan* decision,¹¹ would invalidate petitioner's contempt convictions under the Due Process Clause of the Fourteenth Amendment. But since that is not the issue formally presented to this Court it is enough to say that the proceedings here were not only in the nature of an unconstitutional entrapment as defined in the *Raley* case but were such as to put squarely in issue the constitutional validity of the New York penalties for the invocation of the federal privilege against self-incrimination. Having been told by the Assistant District Attorney that he could at any time invoke that privilege on pain of forfeiting his public office and having been convicted of contempt for claiming that privilege, the validity of such threatened forfeiture is inescapably presented. And the fact that petitioner was immediately and summarily discharged upon refusing to sign a second waiver of immunity only demonstrates the reality and substantiality of the penalties imposed by New York law.

Thus the combination of the historic constitutional change embodied in *Malloy v. Hogan* and the totality of the circumstances surrounding the petitioner's invocation of the federal privilege against self-incrimination combine to differentiate the governing principles and the facts in-

¹¹ In fact, the *Regan* decision has never been cited or utilized by this Court subsequent to its rendition in 1955.

volved in *Regan v. New York, supra*.¹² The question presented for decision herein, the question as to which certiorari was limited by this Court, is necessarily and properly at issue by virtue of the judgments below.

2. THE FOURTEENTH AMENDMENT PROHIBITS ANY PENALTY FOR INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THUS OUTLAWS THE SUMMARY PUBLIC EMPLOYMENT FORFEITURE DECREED BY ARTICLE I, SECTION 6, OF THE NEW YORK STATE CONSTITUTION AND SECTION 1123 OF THE NEW YORK CITY CHARTER

At the heart of this case is the constitutional principle recognized in *Malloy v. Hogan*, 378 U.S. 1, 8, that "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." The Fourteenth Amendment, in other words, bars any criminal or other penalty directed solely at the act of claiming the privilege and refusing to answer questions in a state proceeding where the answers are reasonably thought to be incriminatory.

Here this petitioner sought to invoke that Fourteenth Amendment privilege, a privilege which the Assistant District Attorney persistently acknowledged was his to invoke. And because of that invocation petitioner has thrice been convicted of contempt of court, following judicial commands

¹² The suggestion of Judge Weinfeld in the federal court proceeding below (290 F. 50, n. 20) that the relevance of the *Malloy* case "is less clear, since the *Regan* court seems to have proceeded on the assumption that the self-incrimination clause did apply" is impermissible. Mr. Justice Reed, the author of the *Regan* opinion, wrote the opinion for the Court in *Adamson v. California*, 332 U.S. 46, 50-51, which expressly reaffirmed the pre-*Malloy* rule that the Fifth Amendment's protection of the privilege against self-incrimination "is not made effective by the Fourteenth Amendment as a protection against state action." It is not to be supposed that Mr. Justice Reed abandoned the *Adamson* principle in writing the *Regan* opinion. The *Regan* opinion, 349 U.S. at 59, cites the *Adamson* case preceded by a "Cf."

to answer an incriminating question. The constitutional invalidity of such convictions is made obvious by the *Malloy* case and the host of federal cases that preceded it with respect to the Fifth Amendment. See, e.g., *Hoffman v. United States*, 341 U.S. 479; *Blau v. United States*, 340 U.S. 159.

The constitutional vice inherent in petitioner's convictions is no less obvious by reason of the fact that he signed a limited waiver of immunity, required by state law as a condition of maintaining his position as a policeman. As the *Malloy* opinion noted, 378 U.S. at 8, the great constitutional privilege to remain silent in the face of incriminating questions involves two basic corollaries: (1) that the individual may waive the privilege and choose to speak "in the unfettered exercise of his own will," and (2) that if he chooses to remain silent he shall "suffer no penalty . . . for such silence." And because the limited waiver of immunity signed by petitioner, at a time when he had no opportunity to consult counsel, was the natural and intended consequence of a state scheme to violate those two corollaries, the waiver constitutes no basis for punishing the petitioner for refusing to answer an incriminating question.

In essence, the New York State Constitution (Article 1, Section 6) and the New York City Charter (Section 1123) provide that a public officer like petitioner must, as a condition of maintaining his public position, sign a limited waiver of immunity when called upon to testify concerning the conduct of his office or the performance of his official duties. Refusal to sign such a waiver results in his automatic removal from office¹⁵ and in disqualification

¹⁵ In *Slochower v. Board of Education*, 350 U.S. 551, 554, it was noted that the New York Court of Appeals authoritatively interpreted § 903 of the New York City Charter—the virtually identical predecessor of the present § 1123—to mean that "the assertion of the privilege against self incrimination is equivalent to resignation." *Daniman v. Board of Education*, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377; appeal dismissed for want of a properly presented federal question, 348 U.S. 933.

from holding any other public office or employment with the State for a period of five years and with the City forever.

While cast in terms of requiring the signing of a waiver of immunity, these provisions are plainly designed to fasten their penalties on those who fail to waive their privilege against self-incrimination. A waiver of immunity is nothing more than one method of waiving the privilege. See *Daniman v. Board of Education*, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, where the New York Court of Appeals spoke of these penalties as applicable to those public officers asserting "the privilege against self incrimination." And now that the privilege that petitioner invoked and that led to his dismissal and contempt convictions has acquired the protection of the Fourteenth Amendment, the provisions in question must be viewed as exacting their penalties on those public officers who seek to assert their Fourteenth Amendment privilege against self-incrimination.

Moreover, these New York constitutional and charter provisions must be viewed in terms of their impact both on those who sign and those who do not sign limited waivers of immunity. Those public officers who decline to sign waivers and simply assert their federally-protected privilege are obviously subject to the described penalties. But those who do sign waivers and then assert their federally-protected privilege are no less affected by the compulsive thrust of the summary penalties. An individual who signs a waiver of immunity under the threat of summary employment forfeiture as expressed in these constitutional and charter provisions can hardly be said to have chosen to answer incriminating questions "in the unfettered exercise of his own will." *Malloy v. Hogan, supra*, 8. Especially is that true as to this petitioner, who was constantly reminded by the Assistant District Attorney that any failure to sign the waiver or any assertion of his

federal privilege would immediately call into play the penalty provisions in question.

In short, the coercive pressure of these penalties is nonetheless constitutionally significant when the pressure achieves its intended result. "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . ." *Union Pacific R. Co. v. Public Service Commission*, 248 U.S. 67, 70.¹⁴

From any standpoint, therefore, the practical and intended consequences of the New York constitutional and charter provisions are to penalize and inhibit all those public officers seeking to invoke their Fourteenth Amendment privilege against self-incrimination. They must either forfeit their privilege or their employment. And the summary forfeiture of employment is certainly punishment in one of its severest forms. *United States v. Lovett*, 328 U.S. 303, 316.¹⁵ Such a coercive choice cannot be sanctioned under the Fourteenth Amendment.

This Court in *Slochower v. Board of Education*, 350 U.S. 551, held that the summary dismissal of a public officer pursuant to what is now Section 1123 of the New York

¹⁴ Mr. Justice Holmes, speaking for the Court in the *Union Pacific* case, further added, 248 U.S. at 70: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

¹⁵ The *Lovett* opinion, 328 U.S. at 316, stated that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is the type of punishment which Congress has only invoked for special types of odious and dangerous crimes . . ."

City Charter¹⁶—one of the two provisions here in issue—violated the Due Process Clause of the Fourteenth Amendment. The employee had there invoked his Fifth Amendment privilege against self-incrimination in an appearance before an investigating committee of the United States Senate, an invocation which caused his immediate dismissal under the City Charter provision. In voiding that dismissal, this Court noted that the City Charter provision “operates to discharge every city employee who invokes the Fifth Amendment” and that its heavy hand “falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive.” 350 U.S. at 558.

And when the heavy hand of that provision falls on a city employee who seeks to invoke his Fourteenth Amendment privilege, compelling him either to forfeit his job or forsake the privilege, the *Slochower* ruling points to the constitutional invalidity of any contempt conviction resulting from reliance on that privilege. If it is constitutionally invalid, as *Slochower* holds, automatically to discharge an employee for asserting a constitutional privilege, it is no less invalid to punish him through summary contempt proceedings for asserting that privilege.

What we have here, stated somewhat differently, is a classic instance of an attempt by a State and a City to impose an unconstitutional condition or penalty upon the privilege of public employment. But as this Court held in *Frost v. Railroad Commission*, 271 U.S. 583, 594, one of the limitations on the power of a state to grant or deny a privilege

“. . . is that it may not impose conditions which require the relinquishment of constitutional rights. If

¹⁶ At the time of the *Slochower* decision this provision was known as § 903 of the Charter. Section 1123 is simply a recodification of § 903, with no material change.

the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Precisely because these provisions of the City Charter and State Constitution do impose, as a condition of public employment, the relinquishment of a federal constitutional privilege they must fall under the ban of the United States Constitution, particularly where that relinquishment has resulted in criminal contempt convictions. No government, federal, state or local, can establish as a condition of employment the relinquishment of the federal constitutional privilege against self-incrimination. See *Steinberg v. United States*, 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert v. Verner*, 374 U.S. 398, 404, n. 6.¹⁷ To establish such a condition is to encumber the constitutional privilege with penalties and inhibitions. This no government may do. *Malloy v. Hogan*, 378 U.S. 1, 8; *Griffin v. California*, 380 U.S. 609, 614; *Orloff v. Willoughby*, 345 U.S. 83, 91.¹⁸

Nor is the validity of these provisions saved by the fact that this petitioner, without benefit of counsel, bent under

¹⁷ In the *Steinberg* case the Court of Claims held invalid a federal statute providing that federal annuities shall not be paid to federal employees who have asserted the privilege against self-incrimination in any investigation with respect to their federal service. Such a statute was said to constitute an indiscriminate classification of the innocent with the guilty and must fall as an assertion of arbitrary power.

¹⁸ See also *Opinion of the Justices*, 332 Mass. 763, 765, 126 N.E. 2d 100, 102-103; *In re Holland*, 377 Ill. 346, 356-357, 36 N.E. 2d 543, 548; *Matter of Grae*, 282 N.Y. 428, 26 N.E. 2d 963.

See, in general, Note, *Mandatory Dismissal of Public Personnel and the Privilege against Self Incrimination*, 101 U. of Pa. L. Rev. 1190 (1953); Ratner, *Consequences of Exercising the Privilege against Self-Incrimination*, 24 U. of Chi. L. Rev. 472, 495 (1957).

the pressure and signed a limited waiver of immunity. The very choice imposed upon him by the City Charter and the State Constitution—the choice between (1) asserting the privilege and thereby forfeiting his employment and (2) signing a waiver and thereby subjecting himself to possible prosecution—was one that no state can properly impose if due respect is to be paid to the principles underlying the privilege against self-incrimination. Compare the state-imposed choice held invalid in *Baggett v. Bullitt*, 377 U.S. 360, 374. If any waiver of the privilege is to be validated, it must occur as the result of the individual's free and unfettered will rather than as the result of a threat of summary loss of employment. And it is that threat, whether or not it is executed, that unduly invades the aura of free will that must necessarily surround any decision to assert or waive the constitutional privilege. The state, in other words, has no constitutional power to put petitioner to "a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden." *Frost v. Railroad Commission*, 271 U.S. 583, 593.

Finally, it must be emphasized that the only constitutional principle at stake here concerns the direct assault made upon the assertion of the Fourteenth Amendment privilege by the City Charter and the State Constitution. These appeals from the two contempt convictions do not in any way involve or challenge any power New York may have to discipline or discharge petitioner or any other public employee for refusing to disclose information about the performance of his public duties. See *Slochower v. Board of Education, supra*, 559. We are dealing here solely with an effort to penalize and to inhibit a basic constitutional privilege. The validity of that effort is quite unrelated to any power to take some other form of state action in light of the assertion of the privilege. And whether and to what extent the decision in *Malloy v. Hogan* may alter the considerations relevant to assessing the power to take some other disciplinary action are matters that must be

left to another day. Cf. *Beilan v. Board of Education*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468. The sole consideration here relates to punishment by contempt for exercising a federally-protected privilege.

It is irrelevant, therefore, to ponder the Holmesian dictum that the petitioner "has no constitutional right to be a policeman." *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517. This Court need not pause here, any more than it did in *Wieman v. Updegraff*, 344 U.S. 183, 192, "to consider whether an abstract right to public employment exists." It is sufficient to say, as in *Wieman*, "that constitutional protection does extend to the public servant whose exclusion [from employment] pursuant to a statute is patently arbitrary or discriminatory." See also *Torcaso v. Watkins*, 367 U.S. 488, 495-496; *Baggett v. Bullitt*, 377 U.S. 360; *Shelton v. Tucker*, 364 U.S. 479; *Camp v. Board of Public Instruction*, 368 U.S. 278. It need only be added that the public servant, like any citizen, is free to assert a constitutional right or privilege free of any coercive threat of employment forfeiture or other penalty should he fail to waive that right or privilege.

And among the constitutional protections extending to public servants—including policemen—is the Fourteenth Amendment privilege against self-incrimination. Like every other citizen, the public servant is entitled to assert that privilege freely and without fear of automatic penalty for so doing. And when the public servant is summarily excluded from office because he asserted that privilege, or when on pain of summarily losing his employment he is forced to waive the privilege, the Fourteenth Amendment steps in to outlaw the causative state action. That action in this instance is to be found in Section 1123 of the New York City Charter and in Article 1, Section 6, of the New York State Constitution. And the result of that unconstitutional action is to be found in the contempt convictions of the petitioner, convictions premised upon petitioner's attempt freely to assert his federal constitutional privilege.

CONCLUSION

For these various reasons, the judgments below in No. 210 and No. 290 should be reversed.

Respectfully submitted,

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December, 1965.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner*,
v.

CHARLES A. MARKS, Justice of the Supreme Court of
New York, County of New York, *Respondent*.

On Writ of Certiorari to the Appellate Division of the
Supreme Court, First Judicial Department
in the County of New York

No. 290

JAMES T. STEVENS, *Petitioner*,
v.

JOHN J. McCLOSKEY, Sheriff of New York City, [¶]
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

**BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, AS AMICUS CURIAE,
URGING REVERSAL**

This brief amicus curiae, urging reversal of the judgments below, is filed on behalf of the Patrolmen's Benevolent Association of the City of New York with the consent of the parties.¹

¹ The written consents of counsel for the petitioner and counsel for the respondents have been lodged with the Clerk pursuant to Rule 42(2).

The Patrolmen's Benevolent Association of the City of New York is an organization representing and composed of more than 22,000 members of the Police Department of New York City. It has a vital concern with the issues and principles at stake before the Court in these cases, particularly since approximately 150 of its members have been forced to sign waivers of immunity and have testified in the grand jury proceedings that gave rise to the instant cases.

The Patrolmen's Benevolent Association subscribes fully to the constitutional and legal arguments set forth in the brief of the petitioner James T. Stevens. In so doing, the Association wishes to underscore and emphasize the coercive nature of the choice put upon police officers by the provisions of Section 1123 of the New York City Charter and Article 1, Section 6, of the New York State Constitution. It is that choice, the choice between waiving a federal constitutional privilege or losing one's employment rights, that renders unconstitutional the provisions in question.

Any contention that this choice lies within the bounds of the individual's free will is unrealistic. When a police officer is confronted by an Assistant District Attorney with the statement that a refusal to sign a limited waiver of immunity will bring into operation the employment forfeiture provisions of the City Charter and State Constitution, the police officer has no free choice in the matter. Fearful of losing his job, fearful of losing forever his employment opportunities with the City, he will, more often than not, feel compelled to sign the waiver and forfeit his constitutional privilege against self-incrimination. Such has been the experience and the motivation of all the many police officers who have signed the waivers.

There is thus no real freedom in "choosing" to sign the waiver. That freedom, which is the hallmark of any meaningful waiver of a constitutional right, has been replaced by the coercive and frightening threat of the permanent and summary loss of employment. To lose one's employment in these circumstances involves not only the immediate destruction of economic security but the inevitable stigma of a dischargee. Other employment opportunities will unquestionably be severely limited as to one who has a summary discharge on his record; certainly no government or civil service job would ever be offered such a person. And the dischargee stands to lose all his pension rights, which vest after 20 years of service and which amount to one-half pay for the rest of his life plus a widow's pension. The loss of these rights cannot be considered inconsequential.

Such economic disabilities must be regarded as punishment. *Cummings v. Missouri*, 4 Wall. 277, 323; *United States v. Lovett*, 328 U.S. 303, 316.² And to inject this threat of punishment into the atmosphere surrounding the determination of whether to assert or waive one's constitutional privilege against self-incrimination effectively destroys the unfettered free will which should mark that choice. See *Malloy v. Hogan*, 378 U.S. 1, 8. Therein lies the constitutional infirmity of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution.

² The punishment inherent in the provisions of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution contains many of the elements of a bill of attainder as described in the *Cummings* and *Lovett* cases. But their direct impact upon the freedom of choice in asserting or waiving the federal privilege against self-incrimination makes it unnecessary to explore these provisions in terms of bills of attainders.

It is no answer to say that the State may condition the privilege of public employment upon such conditions and terms as it sees fit to impose. Certainly a State may not punish summarily any employee who asserts a federal constitutional right. *Slochower v. Board of Education*, 350 U.S. 551. No less may it do so indirectly by threatening punishment under the guise of enforcing a condition of public employment. As this Court said in *Frost v. Railroad Commission*, 271 U.S. 583, 593, "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege [such as public employment] which the state threatens otherwise to withhold." See also *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507; *Alston v. School Board of City of Norfolk*, 112 F. 2d 992, 997 (C.A. 4); *Peck v. Cargill*, 167 N.Y. 391, 60 N.E. 775.

Petitioner is quite correct in noting (Brief, pp. 38-39) that these cases in no way involve the right of the City or the State to discipline or discharge policemen for failing to cooperate in an investigation into the conduct of their official duties.⁸ The sole question

⁸ Such cases as *Christal v. Police Commission of San Francisco*, 33 Cal. App. 2d 564, 92 P. 2d 416, 419; *Souder v. City of Philadelphia*, 305 Pa. 1, 156 A. 245; *Scholl v. Bell*, 125 Ky. 750, 102 S.W. 248; and *Drury v. Hurley*, 339 Ill. App. 33, 88 N.E. 2d 728, are not in point. Those cases involved disciplinary proceedings, including due notice and an opportunity to be heard, as to policemen who had remained silent when questioned about their official functions. They did not involve consideration of any coercive threat directed to the initial choice to speak or to remain silent.

here is whether the City and State may constitutionally destroy the unfettered freedom which was designed to accompany the choice of speaking or remaining silent when confronted with incriminating questions. On that score, the combined voices of the members of the Patrolmen's Benevolent Association of the City of New York can testify to the fact that such freedom has in fact been corrupted by the provisions in question. And they urge that such provisions be stricken down as being an unconscionable burden upon the free assertion of the privilege against self-incrimination as protected by the Fifth and Fourteenth Amendments.

Respectfully submitted,

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FILE

IN THE
Supreme Court of the United States
October Term, 1965

JAN 4

JOHN F. DAVIS

No. 210

JAMES T. STEVENS,

Petitioner,

—v.—

CHARLES A. MARKS, Justice of the Supreme Court
of New York, County of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE
SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN
THE COUNTY OF NEW YORK

No. 290

JAMES T. STEVENS,

Petitioner,

—v.—

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

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IN THE
Supreme Court of the United States

October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

—v.—

CHARLES A. MARKS, Justice of the Supreme Court
of New York, County of New York,

Respondent.

No. 290

JAMES T. STEVENS,

Petitioner,

—v.—

JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Superior Officers Council of City of New York Police Department respectfully moves for permission to file a brief in this case as amicus curiae in support of the position of the above named petitioner James T. Stevens.

We have received written permission, from the respective counsel for each of the above named parties, to file such a brief amicus curiae in this case. Annexed to this motion is a copy of the letter of permission dated December 22, 1965 from Hon. Frank S. Hogan, District Attorney, New York County, counsel for both of the above named respondents; and a copy of a like letter of permission, dated December 22, 1965, from Eugene Gressman, Esq., co-counsel for the above named petitioner.

The reason why we are making this motion for permission by the Court to file our brief amicus curiae—i.e., the reason why we are not presuming to file our brief amicus curiae solely on the strength of the written permission of the parties—is that our amicus curiae brief is not “presented within the time allowed for the filing of the brief of the parties supported” (Rule 42(2)). This motion, then, is in the nature of an application for an order waiving the time requirement of Rule 42. It is respectfully urged that such application is worthy because we believe that the legal issues of this case cannot be thoroughly considered by the Court without the items presented in our amicus curiae brief.

Before describing the contents of our amicus curiae brief which we believe merit its acceptance even for late filing, we pause to recite the interest of the amicus curiae.

The organization known as the Superior Officers Council of City of New York Police Department is composed of four associations of New York City superior police officers, namely, Captains Endowment Ass'n, Lieutenants Benevolent Ass'n, Sergeants Benevolent Ass'n, and Detectives Endowment Ass'n. These four associations composing the

Superior Officers Council are concerned with the job security and financial welfare of their individual members, all of whom are police officers of the respective ranks indicated in the names of the four associations. We therefore have a direct interest in the case of the above named petitioner, James T. Stevens, who is in effect testing before this Court the constitutionality of his dismissal from office as a New York City police lieutenant, as a penalty for his refusal to surrender his constitutional privilege against self incrimination before a State Grand Jury; albeit the case comes to this Court upon review of convictions for contempt.

Returning now to the contents of our brief amicus curiae as justifying the granting of this motion because of the usefulness of our legal presentation for the rendering of a correct decision in this case: Throughout the course of this case thus far, in both the State and Federal courts, the dispositive ground of decision against petitioner Stevens has been that *Regan v. New York*, 349 U.S. 58, is controlling against Stevens' position in the contempt prosecutions. However, it appears that all of the courts which have rendered decisions or written opinions thus far in this litigation have overlooked the important fact that the New York immunity statute (N.Y. Penal Law §381) which was deemed controlling in the *Regan* case is radically different from the New York immunity legislation (N.Y. Penal Law §381 *as amended*, plus N.Y. Penal Law §2447) which is operative in the instant case. The New York immunity statute in *Regan* was of the "automatic" or self-executing type, that is, the giving of testimony automatically cloaked the witness with immunity; whereas the herein operative New York immunity legislation is discretionary and selective in operation

and the immunity thereunder does not attach until quite specifically prescribed procedures are first had—these procedures have not been had at all in this case. This Court was able to affirm the contempt conviction in *Regan* because the petitioner in that case had automatic immunity and was therefore held to have no possible justification for refusing to testify. But in the instant case, under the amended New York immunity legislation, the petitioner Stevens is a long way from any assured expectancy of immunity.

As above mentioned, all of the State and Federal courts which have thus far sat in the instant case were apparently unaware of this change in the New York immunity legislation; at least they have apparently been unaware of its effect in regard to the analysis of the *Regan* decision as being the supposedly controlling precedent for this case; there is no mention in any of the court opinions below in this case of the statutory change to which we refer.

It is apparently true also that the parties in this litigation thus far have not been aware of the effect of the above mentioned statutory change as applied to this case, or apparently of the existence of the change, for apparently the parties have not mentioned said change in their arguments and briefs—subject to the qualification that we have not yet seen the brief of the respondents in this Court; but in any event the point should be developed for the petitioner Stevens, whom it aids.

Our amicus curiae brief treats also another important point whose analytical relevance to this case has not, apparently, thus far come to the attention of the parties or of any of the Courts below. We refer to the New York decisional rule of constitutional law that, aside from

statute, the compelling of grand jury testimony from a prospective defendant works a breach of his privilege against self incrimination and requires dismissal of any indictment based on or derived from such testimony. If this phase of the law of New York is not thoroughly presented for the Court's consideration in the instant case there is a danger of arriving at the erroneous conclusion that, notwithstanding the statutory change from automatic to selective immunity, petitioner Stevens still gets "automatic" immunity under the rule of decisional law above referred to. Such a conclusion would be erroneous because, as we demonstrate in our *amicus curiae* brief, this supposed "automatic immunity" is not only an incomplete "immunity" on the State level itself, but it is also apparently ineffective to generate the accompanying Federal immunity required under *Murphy v. Waterfront Commission*, 378 U.S. 52.

It is therefore respectfully submitted that the points presented in our brief *amicus curiae*, being believed to be essential for a correct decision in this case and being apparently not likely to be available from the presentations of the parties themselves (and being absent also from the opinions of the Court below), are of such importance as to justify the Court in receiving our brief notwithstanding its lateness under Rule 42.

We submit also that our lateness in itself should not be regarded as inexcusable. The scheduling of the case in this Court has been on an expedited basis, we are informed. As a non-party we have been handicapped in obtaining access to the papers in the case. Furthermore, the seeming importance of the legal points which we have presented

in our brief amicus curiae has caused us to feel that we are under a special responsibility to try to make sure that our presentation is as legally correct as we can make it, and this could not be hurried.

Wherefore, it is respectfully prayed that this motion for permission to file a brief amicus curiae in support of the petitioner James T. Stevens in this case be granted.

Respectfully submitted,

HERMAN VAN DER LINDE

ABRAHAM GLASSER

*Attorneys for Superior Officers
Council of City of New York Police
Department, Movant-Amicus Curiae*

[Copies of the letters of permission from the parties follow.]

Letter of Permission from Respondents' Counsel

DISTRICT ATTORNEY

THE

**COUNTY OF NEW YORK
155 Leonard Street
New York 13, N. Y.
REctor 2-7300**

**FRANK S. HOGAN
DISTRICT ATTORNEY**

December 22, 1965

**Mr. Herman VanderLinde
445 East 161st Street
Bronx, New York 10451**

**Re: Supreme Court of U. S.
October Term—1965
No. 210 STEVENS v. MARKS
No. 290 STEVENS v. McCLOSKEY**

Dear Mr. VanderLinde:

Permission is hereby granted for your office to file an Amicus Curiae brief for the Superior Officer's Council, Police Department City of New York in behalf of the Petitioner, James T. Stevens.

Very truly yours,

**/s/ FRANK S. HOGAN
Frank S. Hogan
District Attorney
New York County**

**Per /s/ MICHAEL R. STACK
Michael R. Stack
Assistant District Attorney**

MRS:en

**cc: John P. Schofield, Esq.
231 West 96th Street
New York 25, New York**

Letter of Permission from Petitioners' Counsel

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December 22, 1965

Herman J. Van der Linde, Esq.
445 East 161st Street
Bronx, New York 10451

Re: *Stevens v. Marks*, No. 210,

Oct. Term 1965

Stevens v. McCloskey, No. 290,

Oct. Term 1965

Dear Mr. Van der Linde:

As co-counsel for the petitioner, James T. Stevens, in the above-entitled cases now pending in the Supreme Court of the United States, I hereby consent to the filing of an amicus curiae brief on behalf of the Superior Officers Council, Police Department of the City of New York.

Sincerely yours,

EG/sja

/s/ EUGENE GRESSMAN
Eugene Gressman

IN THE

Supreme Court of the United States

October Term, 1965

JAN 7 1966
JOHN F. DAVIS, CLERK

No. 210

JAMES T. STEVENS,

Petitioner,

against

CHARLES A. MARKS, Justice of the Supreme Court of
the State of New York, County of New York,

Respondent.

**On Writ of Certiorari to the New York Supreme Court,
Appellate Division, First Department**

No. 290

JAMES T. STEVENS,

Petitioner,

against

JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit**

**OPPOSITION TO LATE FILING OF BRIEF AMICUS
CURIAE ON BEHALF OF SUPERIOR OFFICERS
COUNCIL OF THE CITY OF NEW YORK
POLICE DEPARTMENT**

FRANK S. HOGAN

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155 Leonard Street

New York, New York 10013

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Assistant District Attorney

Of Counsel

IN THE
Supreme Court of the United States
October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

against

CHARLES A. MARKS, Justice of the Supreme Court of the
State of New York, County of New York,
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**OPPOSITION TO LATE FILING OF BRIEF AMICUS
CURIAE ON BEHALF OF SUPERIOR OFFICERS
COUNCIL OF THE CITY OF NEW YORK
POLICE DEPARTMENT**

On December 22, 1965, the respondent consented to the filing of briefs amicus curiae on behalf of the Patrolmen's Benevolent Association and the Superior Officers Council. Both amici intended to file points urging reversal. At that time approximately ten days had elapsed since service of petitioner's brief. A week afterward, on December 30, 1965, the brief on behalf of the Benevolent Association was received and filed without opposition.

On January 4, 1966, respondent was informed that the brief of the second amicus was completed and would be filed with the Court. On that day, respondent received a copy of that brief together with a motion for leave to file the brief late. The brief of respondent is due no later than January 10, 1966. As of January 4, 1966, the brief was virtually completed; three of its four points had been submitted to the printer. The manuscript of the final point was being edited. The schedule allowed no major additions or revisions at this stage.

A cursory perusal of the Superior Officers' 20 pages of argument reveals that his points are substantially and materially different from those advanced by petitioner himself. Amicus relies upon authorities not asserted by petitioner, to support a theory altogether apart from the argument of petitioner. The injection of such new matter would require respondent, in the interest of a complete response, to alter portions of the brief already printed and to add new and additional points. In vital respects the arguments of amicus are fallacious, but the demonstration of fault, in this extremely complex area, necessitates long and painstaking exposition. To so amend our brief at this late date is physically impossible.

In consenting to the late filing of amicus briefs on a date when they were already late, respondent assumed that they would be consistent with petitioner's points and would be received in time to incorporate response to such arguments as might require particular refutation. The filing of a brief urging reversal, based on an entirely new legal point—albeit erroneous—on the eve of the due date of respondent's brief is unfair, highly prejudicial, and inconsistent with the prior understanding of the parties.

WHEREFORE, respondent is obliged to rescind the consent previously given and oppose the reception of the brief on behalf of the Superior Officers Council.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

January, 1966

IN THE

JAN 8 1966

Supreme Court of the United States
October Term, 1965

JOHN F. DAVIS, CLERK

No. 210

JAMES T. STEVENS,

Petitioner,

against

CHARLES A. MARKS, Justice of the Supreme Court of
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On Writ of Certiorari to the New York Supreme Court,
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JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit

RESPONDENTS' BRIEF

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H. RICHARD UVILLER

MICHAEL R. STACK

Assistant District Attorneys

Of Counsel

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IN THE
Supreme Court of the United States

October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

against

CHARLES A. MARKS, Justice of the Supreme Court of the
State of New York, County of New York,
Respondent.

**On Writ of Certiorari to the New York Supreme Court,
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No. 290

JAMES T. STEVENS,

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against

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit**

RESPONDENTS' BRIEF

Opinions Below**No. 210**

The opinion of the Appellate Division is reported at 22 App. Div. 2d 683 (1st Dept. 1964) (210 R. 42-3).* The order denying leave to appeal to the New York Court of Appeals is reported at 15 N. Y. 2d 483 (1965). The opinion of District Judge HERLANDS denying petitioner's motion for a writ of habeas corpus will be found at 234 F. Supp. 25 (S. D. N. Y. 1964) (290 R. 39-42).**

No. 290

The opinion of District Judge WEINFELD, denying petitioner's motion for a writ of habeas corpus, is reported at 239 F. Supp. 419 (S. D. N. Y. 1965) (290 R. 43-50). The opinion of the United States Court of Appeals for the Second Circuit affirming the order is reported at 345 F. 2d 305 (1965) (290 R. 54-63).

Question Presented

The question presented for review by this Court, a question common to both cases, has been propounded as follows:

"Is Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution

* References to the record in No. 210 *Stevens v. Marks* will appear as follows: 210 R. ____.

** References to the record in No. 290 *Stevens v. McCloskey* will appear as follows: 290 R. ____.

in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

"No person shall * * * be compelled in any criminal case to be a witness against himself * * *."

United States Constitution, Amendment XIV, Section 1:

"No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article I Section 6 provides, in part, that no person shall:

"be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to

sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty, or property without due process of law."

The New York City Charter, Section 1123:

"Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former §903.*)"

§381 of the Penal Law provides insofar as relevant as follows:

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

§2447 of the Penal Law entitled "witnesses' immunity" provides as follows:

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for here."

Subdivisions 2 and 3 of this statute define "immunity" and "competent authority."

No. 210: Statement

This is a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, First Department [22 App. Div. 2d 683 (1964)], which dismissed, with an opinion, a petition for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 752 of the Judiciary Law, seeking review of a judgment of the Supreme Court of the State of New York, County of New York (MARKS, J.) rendered July 28, 1964, summarily adjudging petitioner to be in CONTEMPT OF COURT (Judiciary Law, §§750, 751) and sentencing him to thirty days' imprisonment in civil jail and to pay a fine of two hundred and fifty dollars.

No. 290: Statement

This is a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit [LUMBARD, C.J.; SWAN and KAUFMAN, JJ.] affirming, with an opinion, an order of the United States District Court for the Southern District of New York [WEINFELD, J.] denying, with an opinion, a motion for a writ of habeas corpus addressed to an order of the Supreme Court of the State of New York, County of New York [SCHWEITZER, J.] adjudicating the petitioner guilty of criminal contempt of court [Judiciary Law §§750, 751] and sentencing him to be imprisoned in civil jail for a term of thirty days and to pay a fine of two hundred and fifty dollars, or, in default thereof, to serve an additional term of thirty days in civil jail.

The Facts

The First Contempt Conviction

The petitioner, **James T. Stevens**, was a lieutenant in the Police Department of the City of New York; he had been on the force for eighteen years (210 R. 4). On June 26, 1964, he was subpoenaed to appear before a New York County grand jury investigating allegations of bribery and corruption in the Police Department (210 R. 3, 8-9). Prior to being sworn as a witness before that body, the petitioner was advised by an assistant district attorney that the grand jury was inquiring into the crimes of bribery of a public officer and conspiracy to commit that crime (210 R. 9); that he, Stevens, had been called not as a witness but as a "potential defendant" (*id.*); that, under the United States Constitution, he had the right to refuse to answer any questions that might tend to incriminate him (*id.*); that, under the State Constitution and City Charter, a public officer is "required, if he desires to continue to hold his public position," to sign a limited waiver of immunity (210 R. 10); that if the waiver was signed and an indictment voted against him, Stevens' testimony "can and will be used" against him (*id.*). To each of these items, the petitioner signified his understanding; he then announced he was "prepared to sign" the waiver and was sworn (*id.*). Stevens then identified his signature on a document which he understood to be a waiver of immunity whose import he knew (210 R. 10-11). The waiver stipulated as follows:

"I, Lt. James T. Stevens residing at 164 Engert Ave., Bklyn., occupying the office of Police Officer in

the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury." (210 R. 20)

He was given a financial questionnaire, instructed to complete it, and told to return on a later date (210 R. 10-11).

On July 15, 1964, the petitioner appeared before another grand jury where, before being sworn, he identified himself, supplied his present and past police assignments, and acknowledged having signed a limited waiver before the June grand jury (210 R. 12). He was told the nature of the investigation in the July jury and was asked whether he would sign a limited waiver (210 R. 13). The petitioner refused (*id.*). He was told that, although he had the constitutional privilege against self-incrimination which he could invoke "at any time," if he did so he would be "subject to forfeiture" of his public position under the Constitution of New York and the City Charter (210 R. 13). He was also reminded of his waiver executed before the June jury, which the petitioner announced he intended to "withdraw" (210 R. 14). He was then excused. By letter dated

the same day, petitioner was informed that, "having refused to waive immunity from prosecution," his employment as a police officer had been terminated pursuant to the provisions of Section 1123 of the New York City Charter (210 R. 21).

On July 22, 1964, the petitioner was directed to reappear before the First June 1964 Grand Jury (before which he had originally executed the waiver and testified), but refused to give any testimony whatever, asserting his state and federal privilege. He was specifically asked:

"in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers or policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you?" (210 R. 16).

He again refused to reply and was thereupon brought before the Hon. CHARLES A. MARKS, Justice of the Supreme Court of the State of New York, the respondent herein, asked the identical question, and directed to answer. Although petitioner was warned of the consequences of a failure to comply, he steadfastly persisted in his refusal to respond upon constitutional grounds, and was adjudged guilty of criminal contempt (210 R. 17-18). The respondent judge, however, delayed execution of the sentence for a week, in order to give petitioner's counsel time to prepare and submit a memorandum, and asked for argument before the imposition of sentence (210 R. 18-19). That argument took place the following week, and principally concerned whether the recent decision in *Malloy v. Hogan*, 378 U. S.

1 (1964), nullified an earlier decision, *Regan v. New York*, 349 U. S. 58 (1955) (210 R. 27-37). The judge adhered to his ruling finding petitioner in contempt and sentenced him to thirty days in civil jail and fined him two hundred and fifty dollars (210 R. 37).

Upon the application of his attorneys, execution of petitioner's sentence was postponed for five days for the purpose of applying to the Appellate Division for a stay pending appeal (210 R. 37-8). On August 4, 1964, the Hon. BERNARD BOTEIN, Presiding Justice of the Appellate Division, First Department, refused to grant the stay, and shortly thereafter the petitioner was incarcerated (210 R. 51).

While petitioner was serving his thirty-day sentence, he applied to the United States District Court for the Southern District of New York for a writ of habeas corpus, alleging that his privilege against self-incrimination and right to counsel had been violated in the state court proceedings (290 R. 57). The Hon. WILLIAM B. HERLANDS, Judge of the District Court, denied the petition on the basis that petitioner had failed to exhaust his available state remedies (28 U. S. C. §2254), and noted, in this regard, that an appeal was then pending before the Appellate Division [234 F. Supp. 25 (1964)] (290 R. 39-42).

The appeal referred to by Judge Herlands was ultimately decided on October 30, 1964, when the Appellate Division dismissed his petition seeking an annulment of the contempt conviction and remission of the fine, citing this Court's decision in *Regan v. New York*, 349 U. S. 58, *supra*, as controlling. One circumstance as the petitioner, the

Appellate Division held, must await the eventuality of a subsequent prosecution to test the pertinency of *Malloy v. Hogan*, 378 U. S. 1, *supra* (210 R. 42-3).

Leave to appeal this decision to the Court of Appeals was denied both by the Appellate Division (210 R. 55) and the Court of Appeals (210 R. 56).

A petition for certiorari was granted by this Court on October 11, 1965, and the case enumerated No. 210 on the Court's calendar (210 R. 57-8).

The Second Contempt Conviction

On September 28, 1964, the petitioner was haled for the third time before the First June 1964 Grand Jury, again refused to answer the same question as before, and was, consequently, adjudged in criminal contempt of court by the Hon. MITCHELL D. SCHWEITZER, Justice of the New York State Supreme Court (290 R. 45-6, 57). He was once again accorded a stay of execution of sentence in order to apply to the Appellate Division for a stay pending appeal. Instead, however, he attempted to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443, claiming his constitutional rights had been abridged. The Hon. LLOYD F. MACMAHON, Judge of the District Court, relying on the *Regan* decision, dismissed his petition, indicating that petitioner could not do by indirection what he could not do directly, *i.e.*, test the validity of his waiver of immunity in advance of testifying, and further held that neither the relevant section of the charter nor the state constitutional provisions infringed upon any federal constitutional right (290 R. 59). Petitioner then served a

second thirty day sentence and paid another fine in the sum of two hundred and fifty dollars. No appeal having been taken from this conviction, it is not before this Court on certiorari.

The Third Contempt Conviction

On January 11, 1965, the petitioner was once again directed to appear before First June 1964 Grand Jury. He acknowledged that he had previously appeared before that body, had signed a waiver, and had been twice convicted of contempt for not responding to questions (290 R. 11-12). The nature of the inquiry was then restated and the petitioner was reminded that he was a "potential defendant," and that "regardless of what your lawyer may say * * * it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity" (290 R. 15-16).

After being given an opportunity to consult with counsel, the petitioner returned to the jury room and was asked the same question that he had been asked on his two previous appearances before that jury (290 R. 16). Once again he refused to answer, asserting his reliance on the Fifth, Sixth and Fourteenth Amendments to the Constitution. He was then brought before the Hon. MITCHELL D. SCHWEITZER, Justice of the Supreme Court, who directed him to respond. Upon his refusal to obey, he was summarily held in contempt for the third time, fined two hundred and fifty dollars, and sentenced to be imprisoned in civil jail for thirty days (290 R. 21-2).

After he had served his jail sentence but before he paid his fine, the petitioner sought habeas corpus in the United States District Court for the Southern District of New York. The Hon. EDWARD WEINFELD, Judge of the District Court, refused to issue the writ, holding that since he viewed the decision in *Regan v. New York*, 349 U. S. 58, *supra*, as dispositive, and that inasmuch as Stevens could petition this Court for a writ of certiorari (in the case which is presently enumerated No. 210 on the Court's calendar) "the District Court should not be called upon to divine whether *Regan* remains controlling authority" (290 R. 50).

An appeal was then expedited (290 R. 53) to the United States Court of Appeals for the Second Circuit. That court affirmed Judge Weinfeld's denial of the motion for habeas relief, holding that *Regan v. New York*, 349 U. S. 58, *supra*, had not been "weakened, much less *sub silento* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964)" but rather "that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964)." (290 R. 62-3.)

Thereafter on October 11, 1965, this Court granted certiorari, and the case appears on the Court Calendar as No. 290 (290 R. 65).

Summary of Argument

The merits of the issue upon which certiorari was granted were not drawn in question by the decisions below. Although persistently asserted, the claim was explicitly ruled out of the case on the strength of this Court's decision in *Regan v. New York*. If, as the petitioner suggests, the controlling effect of *Regan* has been abrogated, by subsequent decisions or otherwise, the underlying point is not thereby presented to this Court. For the wise and traditional tenets of jurisdiction counsel abstention where raw state law is challenged. Particularly where the provisions in issue are embodied in the Constitution of a state or Charter of a municipality, considerations of federal comity demand that the state tribunals have the first opportunity to pass upon alleged infirmities. And in the instant case, incipient lower court cases indicate that a meaningful construction of the provisions in question might be forthcoming which might obviate some of the challenges leveled against them.

The constitutional issue, moreover, is not ripe for consideration for another reason: the adjudication of contempt was lawful, regardless of the constitutionality of the provisions here challenged. Whether or not these provisions constrained the petitioner to execute a waiver of immunity, thus annulling the waiver, he was nonetheless obliged to answer the questions put to him by the grand jury. For he could not be injured by obedience of the court's direction. If the waiver was valid, he surely could not assert his privilege; if invalid, he was, as a potential defendant and by operation of Section 2447 of the New York Penal Law,

completely protected against use of his compelled testimony and immunized against criminal prosecution on account of any matter he might have revealed. In other words, *Regan*, its reasoning and conclusion, are sound and applicable. The recent decision of this Court in *Malloy v. Hogan*, the only asserted grounds for *Regan's* alleged demise, does not affect that decision, for the case was clearly decided as though the Fifth Amendment were binding upon the states. And the applicability of the privilege therein embodied, alters in no manner the rationale of the *Regan* doctrine.

But apart from these considerations, the Constitution and Charter provisions, fairly construed, are not incompatible with Fifth Amendment rights. The loss of state employment, after procedures affording due process of law, is not such an unreasonable threat as to constitute a "penalty" for the assertion of the privilege against self-incrimination. The public employee, no less than his counterpart in private endeavor, is surely accountable to his employers for the manner in which he discharges the responsibilities of his office. And such an accounting necessarily involves the risk of criminal prosecution for any crimes disclosed. Removal from office for failure candidly and fully to discuss his official performance is but a normal and reasonable action, warranted by a demonstrated lack of fitness.

Nor does the fact that the grand jury is the forum before which a public officer remains silent affect this conclusion. The availability of immunity before that body does not entitle the public servant to its benefits. For the public servant before the grand jury, unlike the private citizen, stands before the representatives of his employers: the

community. Consequently he owes them the same forthright accounting, regardless of peril, that any servant owes his master.

Moreover, he cannot assert the private citizen's claim to protection against "state action" requiring him to surrender "rights." As a servant of the state, the public officer is the state insofar as his official conduct is concerned. And the state, which can justly require its employees to yield certain constitutional rights incompatible with public employ, must be at least as free to investigate itself as is a private body. Therefore, as to internal managerial functions, the state should be regarded as under no special disabilities. The Constitution itself, concerned with the threat to private citizens from the abuse of public power, would appear to commend efforts of the state to ferret out and deter instances of such abuse among its own agents.

Finally, the waiver of immunity, valid upon its execution as the product of a voluntary choice, was not thereafter unilaterally revocable at will. Waivers of all sorts, inherent in the concepts of the rights themselves, are normally operative legal acts subject to withdrawals only upon cause shown. Moreover, where the execution of a waiver, freely and intelligently made, has occasioned a benefit not otherwise forthcoming, it is binding. Under the operation of New York law, the petitioner, as a potential defendant, derived a real and substantial advantage by reason of his waiver of immunity. But for that tender, he would not have been permitted to appear before the grand jury; once sworn, he had both the opportunity to learn the questions relevant to the inquiry, and, more importantly, the privilege to submit his version of the matter, including explana-

tions and extenuating factors which might have prevented his indictment. The jury being obligated to hear him as a sworn witness, he was no less bound to testify. Thus, even if he did not waive his privilege by his answers to preliminary questions—and he may have done so—he could not at that stage annul the operative waiver by which he gained entry to the forum.

POINT I

The constitutionality of provisions of the New York State Constitution and Charter of the City of New York was never drawn in question by the decisions of the courts below in either case, and hence the issue is not properly before this Court.

The petitioner, after executing a waiver of immunity before a grand jury, refused to testify, claiming the waiver was invalid, and was therefor adjudged in contempt of court. In 1955 this Court held, in *Regan v. New York*, 349 U. S. 58, that a witness, situated precisely as is petitioner herein, could not avoid his obligation to testify on the ground that his waiver of immunity had been illegally procured from him. Such a claim, the Court held, was not ripe until a prosecution was actually commenced on account of any matter to which the witness had testified under the waiver. Accordingly, when Stevens asserted before the Appellate Division, First Department, that he had been compelled to execute a waiver of immunity by reason of an unconstitutional mandate, and further, that he had been deprived of his right to consult with counsel, the state appellate court refused to consider his claim on its merits [22 App. Div. 2d 683]. The high court of New York,

in denying leave to appeal, implicitly recognized the controlling force of *Regan*. When the petitioner took his claim to the federal courts, seeking habeas corpus relief, those tribunals also declined to consider the merits of his constitutional claim, citing the *Regan* doctrine. Thus, the issue of whether the challenged provisions of the Constitution of the State of New York and the Charter of the City of New York offend the Constitution of the United States was not decided and, hence, is not drawn in question by the decisions below. Yet that is the very issue upon which this Court granted certiorari.

That both courts below to whom certiorari was directed decided the issue exclusively on the strength of *Regan v. New York (supra)* and never reached the question upon which certiorari was granted is clear from relevant portions of their opinions. The Appellate Division of the New York Supreme Court, First Department (22 App. Div. 2d 683) (210 R. 43) wrote:

“In view of our conclusion that *Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory [sic] v. Hogan*, 378 U. S. 1, and *Escobedo v. Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position.”

Judge WEINFELD, of the United States District Court for the Southern District of New York, stated [239 F. Supp. 419 (S. D. N. Y. 1965)] (290 R. 48-9):

“Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long

as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim."

Judge Weinfeld was also referring to *Regan v. New York*. Judge KAUFMAN, writing for the United States Circuit Court for the Second Circuit, noted that he did not regard *Regan* "as having been weakened, much less *sub silentio* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964)." The court noted as "significant" Justice REED's "exposition of the decision's rationale in *Regan*": "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify" (349 U. S. at 64). "That holding," the Second Circuit went on to say, "its force unimpaired by intervening decisions, is dispositive of Stevens' claims" [345 F. 2d 305 (2d Cir. 1965)] (290 R. 61).

Because certiorari on the question appeared to have been prematurely granted, respondent moved for a reconsideration of the petition. The motion was denied. Nonetheless we renew the point, for it would seem unwise as well as unwarranted for this Court to adjudicate the constitutionality of a provision of a state Constitution where there has been no opportunity for the state courts to consider the issue, or to construe its own Constitution, either in this or any other case.

To sustain certiorari jurisdiction, a federal issue must be drawn in question by the lower court decision upon which review is sought. This tenet is so basic and virtually self-evident that extensive recourse to authorities is perhaps unnecessary. Yet, several cases in this Court deserve mention. In *Musser v. Utah*, 333 U. S. 95 (1948), the

Court, after discovering on oral argument a possible defect of vagueness in a state statute, remanded the matter for state consideration of the issue, declaring, "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it." (*Id.*, at p. 98.) In *Adler v. Board of Education*, 342 U. S. 485, 496 (1952), the appellants in this Court urged for the first time that the state statute was unconstitutionally vague. The Court replied simply, "The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so [citations omitted]." A footnote to Mr. Justice Clark's opinion in *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956), note 2 at p. 555, explains that probable jurisdiction there was noted only after the New York Court of Appeals amended its remittitur to state that a federal question had been presented and passed upon [*Daniman v. Board of Education*, 307 N. Y. 806 (1954)]. In companion cases involving the same issue, this Court granted a motion to dismiss the appeal "for want of a properly presented federal question" in view of the New York Court of Appeals refusal similarly to amend the remittitur as to those defendants [*Daniman v. Board of Education*, 307 N. Y. 806 (1954); 348 U. S. 933 (1955)].

In *Griffin v. California*, 380 U. S. 609 (1965), the Court was called upon to determine whether a provision in the California State Constitution, allowing a prosecutor the privilege of commenting upon an accused's failure to testify, violated the self-incrimination clause of the Fifth Amendment made applicable to the states by the Four-

teenth Amendment [*Malloy v. Hogan*, 378 U. S. 1 (1964)]. Although *Griffin* had been decided by the California Supreme Court before *Malloy*, thus preventing that court from giving consideration to the federal question, both the majority and dissenting opinions in this Court took pains to point out, by way of footnotes, that a state court had adjudicated the federal issue in a later decision [*People v. Modesto*, 62 Cal. 2d 452 (1965) (TRAYNOR, C.J.)]. In the present case, by contrast, no such state adjudication of the federal issue occurred in any matter.

In arguing that the case is properly before this Court (brief, Point I, pp. 19-32), petitioner strives to demonstrate that *Regan* is no longer controlling authority. Stressing that *Malloy* brought the Fifth Amendment privilege to bear on state procedures, he views the authority of *Regan* as thereby destroyed. Apart from the flaws in this reasoning (see Point II, pp. 25-27, *infra*), it fails to support his major point. For even if the petitioner is right and *Regan* has been fatally undercut, the result must be a remand of the constitutional issue to the state courts which mistakenly, albeit justifiably, relied upon the allegedly defunct *Regan* doctrine exclusively.

In other words, the most persuasive demonstration of the demise of *Regan* would not draw in issue the merits of the question upon which certiorari was granted; that can only be done by an adjudication of the issue by the courts below.

POINT II

The question as to the validity of a waiver of immunity should not be litigated in an action for contempt; it must be reserved until such time as the witness may be prosecuted on account of evidence he may give thereunder.

Petitioner, from the court of first instance all the way to this High Tribunal, has sought to excuse his refusal to testify upon the grounds that the waiver of immunity which he executed before the grand jury is invalid, having been procured by duress. Inasmuch as the waiver is invalid, or so runs his argument, he could not be compelled thereunder to testify against himself. Necessarily, therefore he is seeking reconsideration of an earlier case decided by this Court, *Regan v. New York*, 349 U. S. 58 (1955), which held that the putative invalidity of a waiver of immunity is no defense to an action for contempt of court for failure to testify; but the waiver's invalidity could be properly raised in any future prosecution for criminal activity which might be revealed by his testimony. Because that case is factually indistinguishable from the present one, it has been considered dispositive by every court below. It should be held controlling here as well.

That decision was posited upon the existence of a valid state immunity statute affording complete protection for a witness within its scope; because of the immunity statute, a witness is obliged to testify when directed to do so. If the petitioner in that case had not executed a waiver of immunity, he could unquestionably have been compelled to testify, since by operation of law he would,

under such circumstances, receive immunity. Thus, the Court sensibly concluded, even if the waiver were, as Regan claimed, an utter nullity, he would, as any non-waiving witness, be completely immunized, and hence required to testify. Of course, if Regan was wrong and the waiver was binding, the privilege was no longer available and he could not refuse to answer questions with impunity. The Court found no reason for determining the issue of the validity of the waiver in the midst of a grand jury proceeding, since the witness could be compelled to testify regardless; the conviction for contempt was therefore warranted.

Precisely the same seamless logic assures the constitutionality of the present petitioner's conviction for contempt without prior adjudication of the validity of his waiver of immunity. For as with Regan, Stevens was legally obligated to answer questions as directed, regardless of the merits of his contentions concerning the waiver. If the waiver was operable, he had surrendered the privilege and was contumacious in persistently asserting it. If, on the other hand, the waiver was, as he claims, a nullity, then under New York law (Penal Law, §2447), the overriding of his assertion of the privilege by a direction to answer effectively and completely immunized him against future prosecution or the use against him of any testimony thus compelled.

The Appellate Division below, in defining the scope of Section 2447, as applied to the petitioner's case, wrote (210 R. 43): "If the waiver were invalid, petitioner would have received immunity from prosecution under Sections 381 and 2447, Penal Law." It is for this reason that

Regan was deemed controlling. Therefore, notwithstanding certain procedural departures from the letter of the statute, the law of this case, and the interpretation of New York's immunity laws binding upon this Court, is that the petitioner would have received complete immunity even as *Regan* did. Moreover, this reading of the pertinent provisions of New York law was explicitly and independently adopted by the Second Circuit Court of Appeals below (290 R. 61): "Indeed, if Stevens' waiver is defective * * * as we view relevant provisions of the state penal law, immunity from prosecution will automatically follow." [Citing Sections 381(2) and 2447(1) of the New York Penal Law.]

The only distinction that might be drawn between the *Regan* case and the present situation is wholly without constitutional significance. When *Regan* appeared before the grand jury in 1953, whatever immunity he may have acquired was obtained automatically, by operation of law, without the necessity of an affirmative assertion of his privilege against self-incrimination [Penal Law, former §381]. A change in the law in 1953 placed upon the witness the obligation of interposing a refusal to testify before immunity may be conferred by a direction to answer [Penal Law, §§381, 2447]. Since this latter statutory procedure was followed in the instant case to accord Stevens the same immunity *Regan* might have acquired (had their waivers been void), the change of the law does not affect the authority of *Regan*. Indeed, interestingly enough, having complied with the procedures of Section 2447, the State of New York may have, all unwittingly, conferred upon the petitioner greater protection than that enjoyed by a witness testifying under

automatic immunity provisions. At least one lower federal court has held that a defendant in the federal court is accorded no testimonial exclusion of matters obtained from him in a state proceeding, unless such testimony is compelled over an assertion of the privilege [*United States v. Interborough Delicatessen Dealers Asso., Inc.*, 235 F. Supp. 230 (S. D. N. Y., 1964)]. Where, as Section 2447 requires, the state witness in the grand jury asserts the privilege and is directed to answer, therefore, he receives not only complete state immunity, but protection as well against the use of such testimony in a federal proceeding against him.

The petitioner rests his claim that *Regan* is no longer controlling authority primarily upon the advent of *Malloy v. Hogan*, 378 U. S. 1 (1964). The "climate," he asserts, has been so drastically altered by the applicability of the Fifth Amendment to state proceedings that the *Regan* doctrine has withered. His meteorological assessment, however, is faulty. In the first place, as Judge Kaufman pointed out in the opinion of the Court of Appeals, the *Regan* case was decided as though the Fifth Amendment were applicable to the states. In the Court's words (290 R. 62): "As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings."

There is no doubt that the Fifth Amendment's protection may be waived, just as the state's identical privilege may be waived. And it is equally well established that the federal right may be withdrawn if supplanted with an immunity as broad as the privilege lost [*Counselman v. Hitchcock*, 142 U. S. 547 (1892)]. And there is no claim

here that, if the petitioner received immunity, that shield is not sufficiently broad.

Petitioner further asserts that a contempt prosecution has traditionally been the action in which to determine a witness's right to silence or obligation to testify. Thus, he argues, the *Regan* doctrine, which requires that adjudication to be held in abeyance pending a criminal prosecution, is so inconsistent with a multitude of holdings as to be erroneous.

In each case of the line referred to, however, the question has been the scope of the immunity accorded, not whether the witness receives it at all. For example, there has been much litigation concerning whether the immunity granted by one jurisdiction can protect the witness in another [see, e.g., *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964); *Knapp v. Schweitzer*, 357 U. S. 371 (1958); *Ullman v. United States*, 350 U. S. 422 (1956); *Hale v. Henkel*, 201 U. S. 43 (1906); *Jack v. Kansas*, 199 U. S. 372 (1905)]. The witness in those cases was threatened by the very real possibility of a prosecution by another government based upon evidence which he gave to the jurisdiction according him immunity. His doubts on this score justified him in withholding his testimony, at least until his rights were delineated, for if the immunity conferred was not adequate he could not be compelled to testify. Under such circumstances, the contempt conviction must be reversed. Of course, the court might hold him well shielded, but in any case the issue in such cases truly is whether he could be compelled to surrender his privilege. And this issue must necessarily be adjudicated on the contempt citation.

Here, as in *Regan*, the presence of unquestionably adequate immunity legislation materially alters the picture. A witness who is assured by law that, if entitled to immunity at all, that protection will be as wide as he can be accorded may not refuse to testify. For whether he is entitled to immunity or—the only other possibility—has waived it, is beyond his control, and his refusal to answer as ordered must be deemed contumacious. In other words, unlike the situation where it was possible to reverse the contempt conviction because the immunity was not co-extensive with the privilege, the presence or lack of immunity here can not affect the validity of the citation for refusal to answer.

To dispose finally of the assertion that *Malloy* dealt a fatal blow to *Regan*, it must be pointed out that the scope of the requisite immunity is not broadened because it is the Fifth Amendment's privilege which is being supplanted. The federal derivation of the right to silence does not imply that the states must protect against federal prosecution if they seek to adduce testimony. This very argument, after all, was disposed of by this Court in *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964), on the same day that *Malloy* was announced. Ruling in favor of state immunity statutes which would otherwise perish, the Court wisely held that no violation of Fifth Amendment rights occurs if the state awards immunity to the full extent of its power to do so. This unfortunately can not extend to the federal realm, but the state witness, it was held, is adequately insured in the federal tribunal if evidence obtained under state compulsion is unavailable for use against him in that forum.

With noticeable stretch and strain, the petitioner asserts the invalidity of his conviction by reason of "entrapment." By this contortion he reaches the case of *Raley v. Ohio*, 360 U. S. 423 (1959) (brief, pp. 26-32). Upon a rather astonishing record, the Court there observed that all parties below seemed unaware that an automatic state immunity law deprived the witnesses before a legislative committee of their privilege against self-incrimination. Indeed, if it were otherwise, a most unseemly hoax was perpetrated on the witnesses, who were clearly led to believe that the privilege was available to them. Under those circumstances, to punish them for the assertion of the right that was proffered by the chairman is surely entrapment, bizarre though its form may be. In the instant case, the situation is so markedly different as to be virtually contrary: here petitioner was punished for his stubborn adherence to a claimed privilege which he was explicitly and repeatedly told was unavailable [210 R. 10, 13-14, 16, 18; 290 R. 14, 15].

That the prosecutor and the judge who directed the petitioner to answer may possibly have been mistaken as to why the privilege was unavailable can not bring this case within the *Raley* rule. If the legal theory of the prosecutor that the privilege was surrendered by waiver was wrong, the error could only redound to the benefit of the petitioner, had he complied with the court's direction. For, having wrested his privilege from the petitioner, the prosecutor could certainly not thereafter prosecute him on account of his testimony, claiming that he had not intended to confer immunity, or that the technical provisions of the operable statute had not been complied with. Of course, the petitioner could not, at that stage know

whether the prosecutor was wrong and whether he was, by operation of law, covertly obtaining immunity. But uncertainty and entrapment are creatures of altogether different hue. And the misleading advice, if such it was, or the uncertainty thereby induced, does not affect the federal question, so long as the constitutional right of silence was replaced by a coterminus cloak of immunity. And, to return to the refrain, it was here.

The petitioner's ambiguous expectation, moreover, could have no influence upon his legal position. The reason is clear: he was confronted with no choice of action which could affect his rights. Clearly, he was not obliged to stand fast upon his privilege in order to receive the benefits of immunity. Indeed, the two are inconsistent, since immunity is only received for testimony actually given. Nor had he any election to make concerning the execution of a waiver; that decision was behind him and had been made with full knowledge of his option. Thus, at the critical point in the proceedings, the petitioner faced but one course: obedience to the court's directive. That he may have had to follow that course with anxiety does not excuse him from following it.

There may remain a question of state law. For there are several New York cases which indicate that, as a matter of state law, a person might not be subject to penalties of contempt unless his refusal to answer questions was predicated on accurate advice concerning the consequences [see, e.g., *People v. DeFeo*, 308 N. Y. 595 (1955); *People ex rel. Hofsaes v. Warden*, 302 N. Y. 403 (1951)]. But while the witness' mental state of uncertainty may affect the element

of willfulness which New York may deem an aspect of contempt, it is clear that the matter does not rise to a constitutional dimension. Indeed, in the *Regan* case itself, the question of uncertainty was considered and left to state determination (349 U. S. at 64).

Implicit in this Court's decision in *Regan* was the recognition of the necessity and importance of prompt obedience to the orders of a court where the party so directed cannot possibly be injured by compliance. Academic questions of future legal effects are properly relegated to a secondary position. For not all questions of legal consequences must be resolved at once to satisfy the appetite of the litigant for security. Justice frequently requires the efficient disposition of proceedings in progress, reserving the intermediate questions for future resolution. Thus, for example, interlocutory appeals are seldom allowed where the contested matter may be preserved for appeal from the judgment without the loss of rights. And so it is with the matter raised by the present petitioner. Losing no rights by testifying as directed, facilitating thereby the investigation in progress, and fully protected against future harm, he has, as *Regan* stated, no legal excuse for his defiance of the court.

In sum, the underlying premise of the *Regan* decision is eminently sound, and the case, under no infirmity by virtue of subsequent constitutional holdings or changes in the statutory law of New York, commends itself for reaffirmation. The judicial power of contempt, which this Court has often cautioned should be exercised with appropriate restraint, is nonetheless an indispensable adjunct

of the authority and dignity of the courts. Without the enforcement measure, judicial orders may be regarded by the recalcitrant recipient as but words upon the wind. And it requires no research in the library to discover that there are those, even among the highly placed, who would gladly defy court orders. It is not without reason that the blindfolded figure of justice holds not only the scales but the sword.

POINT III

The requirement that public officers disclose to a grand jury incriminatory matters pertaining to the performance of their offices is a fair and reasonable condition of continued public employment and is not repugnant to the Fifth or Fourteenth Amendments of the Constitution of the United States.

The Constitution of the State of New York, Article I, Section 6, while expressing the general precept that no person may be compelled to be a witness against himself, provides that should a "public officer" refuse to testify, or refuse to execute a waiver of the immunity he would otherwise obtain, before a grand jury, concerning the conduct of his office, he shall "be removed" from his office and be disqualified from public office or employment for five years. The New York City Charter, Section 1123, stipulates somewhat more broadly that, should any councilman, officer or employee of the City refuse to appear, execute a waiver of immunity, or testify before a court, legislative committee, or body authorized to inquire concerning the "nomination, election, appointment or official

conduct of any officer or employee" his term of office shall end, and he shall be ineligible for city employment.

Neither of these provisions have been authoritatively construed by the appellate courts of New York. But two things at least may safely be ventured. First, this Court, considering the nearly identical predecessor to the Charter provision, the former Section 903, in the case of *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956), saw no constitutional defect on the face of the provision. Its application, however, was found offensive to due process where the assertion of the privilege before a Senate committee was, without more, the cause for summary dismissal. Second, the lower courts of New York, heeding the *Slochower* opinion, have viewed the dismissal feature of the provisions here at issue as requiring some sort of departmental hearing. For two officers dismissed summarily with the petitioner herein, and on the same basis, have been ordered reinstated [*Conlon v. Murphy*, — App. Div. 2d —, 263 N. Y. S. 2d 360 (1st Dept. 1965); *Matter of Gardner v. Murphy*, 46 Misc. 2d 728 (Sup. Ct. N. Y. Cty. 1965)]. The petitioner's pending suit for reinstatement may well have the same outcome. The summary manner of his discharge is not, of course, presently before this Court for review. But the significant point is that the action taken against him at the departmental level does not define the nature of the procedure to be followed under the Constitution or Charter mandate. It is extremely difficult to project the lines to be drawn judicially for administrative action. But for present purposes, this Court surely will not assume that the courts of New York will adopt an unconstitutional form of action where an alternative consistent with due

process under the Fourteenth Amendment is available. And it would seem, consistent with the opinion of the Court in *Slochower* and other cases, that a departmental procedure where the officer who has invoked his privilege has full opportunity to appear with counsel to answer pertinent questions or supply such explanations or circumstances as may demonstrate his fitness to retain office would satisfy constitutional demands. Hence the state provisions, subject to such construction, are not unconstitutional.

The petitioner contends, in essence, that the challenged provisions are unconstitutional, not because he has lost his office by their operation, but because the economic threat embodied therein compelled him to waive his privilege against self-incrimination. Actually his position, as he describes it, is far from clear. On the one hand, he views the threat of discharge from duty for reliance on the right of silence as "an effort to penalize and to inhibit a basic constitutional privilege" (brief, p. 38). In the same breath, however, he states: "These appeals from the two contempt convictions do not in any way involve or challenge any power New York may have to discipline or discharge petitioner or any other public employee for refusing to disclose information about the performance of his public duties" (*id.*). But the unchallenged power is the life of the challenged provisions of the Constitution and Charter. If petitioner is not entirely withdrawing his troops, he must be asserting merely that the codification of the undisputed authority itself constitutes the duress invalidating the waiver. But this is absurd; advance notice of lawful consequences is just, not coercive.

Yet, despite this puzzling paradox, a coherent argument emerges from the petitioner's point. The waiver, the argument goes, being the product of economic coercion is a nullity and the petitioner could not be compelled thereunder to answer self-incriminatory questions before a grand jury nor adjudicated in contempt for his failure to do so. Thus he claims in effect that by influencing him to incriminate himself, the law of New York offended his rights under the United States Constitution to remain silent. As a corollary, he asserts that by placing his livelihood in jeopardy, regardless of the procedures by which such forfeiture may be accomplished, a penalty is decreed by the State Constitution and City Charter which is proscribed by the Fifth Amendment itself. For in 1964, when this Court held the Fifth Amendment directly applicable to the states in *Malloy v. Hogan*, 878 U. S. 1, the privilege was defined thus by Mr. Justice BRENNAN: "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence" (378 U. S. at p. 8).

The heart of the issue thus posed is whether a waiver of immunity, executed in the shadow of the challenged provisions, is involuntary and hence invalid by reason of threatened unlawful penalty.

To begin, none can seriously doubt the inherent right of a private employer to seek from his employee the answers to questions, which may be incriminatory, bearing upon his fitness for his job. And the information thus furnished may provide the basis of prosecution since the employer has no power to confer immunity. The private employee so

interrogated may surely withhold reply, but the employer, having had no satisfaction, may just as certainly discharge the employee. To deliberate whether the cause of firing is merely the assertion of the privilege, the imputation of guilt, or the demonstrated lack of candor inconsistent with continued responsibility is a semantic exercise only. Realistically, assignment of cause cannot be essayed without reference to the question to which response was withheld. Obviously, there is a different degree of inference of misconduct from a refusal by a bank teller, for example, to say whether he is acquainted with any bookmaker, and his refusal to tell the Vice President whether he has been stealing from the till. But such reference to the question, though interesting and novel, is far afield, traditionally impermissible, and of no consequences for present purposes. For in any case, the bank officer would be remiss in his obligations to depositors if he did not remove the recalcitrant teller from further responsibilities. And none could justly complain that the forfeit of his job trammelled the employee's rights under the Fifth Amendment.

Does the state, through its administrative officers, have any less power over its servants? True, the Constitution, by its terms, restrains not private persons but states from the abridgement of rights. And the old maxim that no man has the constitutional right to work for the state has come to mean simply that the government employee "must comply with reasonable lawful and non-discriminatory terms laid down by the proper authorities" [*Slochower v. Board of Higher Education*, 350 U. S. 551, 555 (*supra*)]. Or, as stated in *Wieman v. Updegraff*, 344 U. S. 183 (1952),

and conceded by petitioner (brief, p. 39), the public servant may be excluded from employment only by regulations which are neither "patently arbitrary" nor "discriminatory." Thus, though the state is under special injunction to protect the rights of all, it is not without authority to lay down reasonable terms of employment.

In this connection, it may be well to observe the distinction between the state *qua* state and the state *qua* employer.* The exercise of state power through its employees against the private citizen is the main concern of constitutional safeguards. But no such considerations govern the management by a state of its internal affairs. Indeed, a limitation of the state's powers to regulate the conduct of its own employees is inconsistent with the private citizen's interest in the proper and restrained external exercise of state power. There is nothing abstruse in this proposition. Concretely, curtailment of the abuse of authority by a police officer is as much in the interest of protecting citizen's rights as the exclusion of evidence unlawfully obtained. Thus, it becomes a higher responsibility for the public than the private employer to probe the conduct of official duties by its employees. And in such a managerial role, the state regulating itself should not be disadvantaged by the constitutional concerns with "state action."

Furthermore, despite the restraints on state abridgment of constitutional rights, this Court has consistently recognized that obtaining or retention of governmental or quasi-official posts may involve the relinquishment of certain con-

* Cf., *New York v. United States*, 326 U. S. 572 (1946); *Ohio v. Helvering*, 292 U. S. 360, 369 (1934); *South Carolina v. United States*, 199 U. S. 437 (1905); *Lloyd v. Mayor &c. of New York*, 5 N. Y. 369, 374 (1851).

stitutional rights, at least to the extent that the invocation of those rights might be incompatible with the nature of the employment.

Both the state and federal government have curtailed the exercise of the First Amendment rights of freedom of speech and association, where its assertion would interfere with some valid governmental interest. Thus teachers who refused to disclose whether or not they were members of the Communist Party were rightfully dismissed; their failure to answer before a committee investigating fitness branding them as "unsuitable" for further public service [see e.g. *Garner v. Los Angeles Board*, 341 U. S. 716 (1951); *Adler v. Board of Education*, 342 U. S. 485 (1952); *Beilan v. Board of Education*, 357 U. S. 399 (1958); *Nelson v. Los Angeles County*, 362 U. S. 1 (1960)]. Similarly, in the interests of governmental integrity, federal civil service employees are forbidden to participate in certain political activities [*United Public Workers v. Mitchell*, 330 U. S. 75 (1947); *Ex Parte Curtis*, 106 U. S. 371 (1882)]. In another situation it has been held that applicants for admission to the bar must satisfy a board of examiners that they are persons of high moral character worthy to practice law, even if in so doing they must reveal past associations they do not care to disclose [see e.g. *In re Anastaplo*, 366 U. S. 82 (1959); *Konigsberg v. State Bar of California*, 366 U. S. 36 (1961)]. However, a candidate cannot be excluded merely for asserting his First Amendment privilege [*Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U. S. 252 (1952)].

As to the Fourth Amendment: undoubtedly certain government personnel, such as those working in the Mint, are subject—as an incident of their employment and without warrant or probable cause—to searches of their persons upon entering or leaving particular premises.

Equally necessary for the protection of a valid governmental interest is the disclosure of criminal activities within the government itself, regardless of whether responsibility falls upon the witness or not. Thus, the state may reasonably condition continued public service upon the relinquishment of a Fifth Amendment right. The condition is particularly justifiable where the nature of the employment is such that the concealment constitutes a virtual renunciation of office [see, Ratner, "Consequences of Exercising the Privilege Against Self-Incrimination," 24 U. of Chi. L. Rev. 427, 503 (1957)]. The disclosure of crime is the police officer's job and shielding a perpetrator from prosecution is dereliction of duty. For them at least, then, employment conditioned on a waiver of the right to silence is pre-eminently reasonable. [See, *Christal v. Police Commissioner*, 33 Cal. App. 2d 564, 92 P. 2d 416 (1939); *Drury v. Hurley*, 339 Ill. App. 33, 88 N. E. 2d 728 (2d Div. 1949); *State v. Nagler*, 44 N. J. 209, 207 A. 2d 689 (1965).]

It would therefore seem both just and reasonable for a municipal department head to question a member of his department concerning his duties, and discharge him for failure to supply answers consistent with his fitness to carry his responsibilities. As with the private employer, the public official has no authority to confer immunity and answers must be given, if at all, under threat of prosecution for any crimes they may reveal. Full protection against

such self-incrimination is afforded by recourse to unbreakable silence. But the consequences must be no different than those faced by the silent employee of a private enterprise.

This is particularly true of military or quasi-military organizations. In 1953, a medical doctor conscripted into the army refused, on grounds of self-incrimination, to disclose past affiliations with the Communist Party. He was, consequently, refused a commission and assigned a technician's post. He sued out a writ of habeas corpus to secure his release from the armed services on the grounds that he was being punished for asserting his Fifth Amendment privilege. It was held:

"It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No'." [*Orloff v. Willoughby*, 345 U. S. 83 (1953)].

The question then becomes whether the result is altered by a change of forum to a grand jury which has the power to confer immunity. At the outset, it must be recognized that the prime function of the grand jury, unlike the municipal department head, is to investigate crime and charge the perpetrators. But the grand jury has an equally important, if secondary, role. Historically, the grand jury

has provided the community at large with a vital supervisory agency over the affairs of government [N. Y. State Const. Art. 1, §6]. And the public official stands before the grand jury, in a real sense, before his employers. Employed by the community, the public officer is responsible to them and to their representatives. Thus, unlike the ordinary potential defendant, a police officer before the jury is facing his civilian employers. They have the same right to demand an accounting of his performance of his public trust as does his executive superior. By virtue of their special power in certain cases to confer immunity, should the public officer be entitled to demand the protection from prosecution in return for his answers which is available to no other employee facing the questions of his employer? We think not. Nor do we believe that the law, in requiring the waiver of such immunity before that body is unjust.

In a case closely analogous to the one at bar [*United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72 (S. D. N. Y., 1965)] the court (TENNEY, J.) held that a General Municipal Law requirement that public contractors waive immunity before investigative bodies on sanction of possible disqualification from receiving contracts with municipalities did not violate the petitioner's federal privilege against self-incrimination, nor had he been compelled, in a federal constitutional sense, to give testimony against himself. Judge Tenney observed that:

"The state has a legitimate interest in excluding from office those who would impair efficiency and honesty in governmental operations. This cannot be doubted. To achieve this end conditions and penalties can be imposed even where they may involve the relinquishment of constitutional rights and privileges,

so long as they bear a reasonable relation to the end sought to be achieved."

Nor has the newly-announced applicability of the Fifth Amendment to the States effected any change:

"I see no reason for this Court to hold that *Malloy v. Hogan*, 378 U. S. 1 (1964) has, in effect, wiped out the prior decisions of the Supreme Court which held comparable statutory enactments valid, though prior to the Malloy decision. The state's vital interest in its employees and persons doing business with it who occupy a position of trust is no less now than prior to Malloy. Of prime importance, however, is the fact that what Malloy proscribes is not waiver of immunity statutes, but rather dismissal (a disqualification) predicated solely upon one's invocation of the Fifth Amendment privilege." (*United States ex rel. Laino v. Warden, supra*, at p. 95)

The power to initiate criminal prosecution lies with the executive superior as it does with the grand jury, although the former is one step further removed from the actual commencement of an action at law. Placing the public servant directly before the jury under a waiver, then, merely transfers the inherent power of the employer to prosecute from one agency of the state to another. There can be no loss of rights by the employee by virtue of such transfer. Nor does the requirement of disclosure deprive the officer of the constitutional right of silence. It rather translates into law the fact that such reluctance to cooperate and furnish a satisfactory accounting is incompatible with continued exercise of public responsibility.* Indeed, it

* For similar state statutes or constitutional provisions, see:

L. A. Const., Art. XIV §15(P)(1); N. J. Stat. Ann. 2A:81-17.1 (Supp. 1964); D. C. Code §1-319 (Supp. 1958).

would be little short of absurd to decree that failure of a police officer to answer whether he received bribes and face criminal consequences must leave the police commissioner helpless to effect a change in the officer's employment without running afoul of the "penalty" proscription.

Nor can it be validly claimed that the public officer before the jury is in a dual capacity, his rights as a threatened private citizen adhering notwithstanding his public position. This argument might be urged if the waiver covered his private affairs, but in fact it is scrupulously limited to official acts. As to such behavior, the witness before the grand jury is the state incarnate. And the proceeding can not be viewed as the forces of the state arrayed against the individual citizen, but rather as the whole examining its own inseparable part. Obviously, so viewed, the constitutional inhibitions on state power must be diminished.

POINT IV

The waiver of immunity, having been freely and voluntarily executed by Stevens, could not be unilaterally withdrawn and replaced by a revived privilege against self-incrimination.

The distillate of the issue underlying Stevens' conviction funnels to the question of whether his waiver of immunity was binding upon him throughout his testimony or revocable by him at any point. It is a difficult and complicated question, involving a consideration of the nature of waivers generally and a study of immunity as accorded by the law of New York.

Waiver is an indispensable constituent in the concept of a right; without it, a right becomes a duty. The law bestows upon citizens rights of various sorts, and all, including the most precious of those enshrined in the Constitution, may be declined. The enjoyment of a right is the exercise of an option implying the equal validity of its refusal. Traditionally, operative waiver of a right requires understanding of its availability and the consequences of self-divestment. [See, *Johnson v. Zerbst*, 304 U. S. 458 (1938).] Thus, the right to trial of a criminal charge, to representation, to confrontation, and to a jury, as well as to remain silent, may be intelligently yielded.

In law, moreover, the understanding ~~adult~~ is normally deemed bound by his elections. Acts and declarations are not easily undone where no new factors require reconsideration of the original choice. And the execution of a waiver imports legal consequences which are often irreversible.

In the case of a waiver of immunity under the law of New York, such consequences preclude revocation. Its execution entitles a potential defendant to appear before a grand jury [N. Y. Code Crim. Proc., §250(2)]. This accords him the opportunity to hear and answer allegations made against him, to put forward explanations or extenuating circumstances which may move the grand jury to favorable disposition. That the decision to appear and testify may, on reconsideration, appear unwise, does not justify withdrawal of the undertaking by which the entry to the forum was gained. The witness is bound to complete his testimony, just as the prosecutor and jury are obligated to hear him. Accordingly, it has been held

by the New York Court of Appeals that the waiver, once executed, may not be cancelled [*People ex rel. Hofsae v. Warden*, 302 N. Y. 403 (1951); *accord, United States ex rel. Laino v. Warden*, 246 F. Supp. 72, 99-100 (S. D. N. Y. 1965)]. In this respect the situation of the potential defendant before the grand jury is analogous to that of an accused in a criminal trial who is similarly privileged to refrain from testifying. Once a defendant takes the stand, however, the privilege is completely waived and he is bound to speak [8 Wigmore, Evidence §2276(2) (3d Ed., 1940)].

It might be argued that the obligation to answer incriminating questions does not attach until the witness has responded to some questions along the same line of inquiry. Under established doctrine, the privilege is lost by failure to assert it when the testimonial foot is first set upon the path to incrimination. Although waiver by operation of this principle is not the gist of the present issue, Stevens, by acknowledging his rank and position in the police force and agreeing to fill out a financial questionnaire (210 R. 11), may well have opened the way to inquiry concerning his corrupt performance of duty in that capacity. However, it is often a delicate matter to determine the precise point at which the privilege is waived by response, and it is partly for this reason that the expedient of prior acknowledgment of a willingness and desire to testify without benefit of privilege, is a fair and wise procedure in the context of a grand jury investigation. [See, *Rogers v. United States*, 340 U. S. 367 (1951).] But the waiver of immunity is far more than a mere gratuitous statement of intention, unilaterally offered, and hence revocable at will.

To appreciate the character and significance of the waiver of immunity, some exploration of the confused and often misunderstood law of New York is unavoidable. Prior to the enactment of Section 2447 of the New York Penal law in 1953, immunity, at least where a crime was being investigated for which immunity could be accorded, was a relatively simple matter. Anyone called as a witness, whether thought to be a "target" or not, automatically received full immunity from prosecution concerning any matter about which he gave responsive answers [Penal Law, former §381]. He was not required to assert any privilege or be ordered to answer any particular question. Thus, no man needed fear that his testimony might afford the basis of prosecution. Of course, once called and thereby fully and automatically protected, he was required to testify and testify truthfully, for no witness was immunized against a contempt or perjury charge on the basis of his conduct as a witness.

Under these circumstances, the waiver of immunity had real meaning. A witness who desired to tell his story, as a defendant on trial, could give in exchange for that opportunity a waiver which from the outset precluded the operation of the automatic immunity. Indeed, it was the only way in which immunity could be waived.

Section 2447 was avowedly intended to accord a benefit to the prosecution. In order to preclude an unwitting immunization, the prosecution was entitled to an affirmative notice by the witness that he believed the answer to a particular question would tend to incriminate him. Thus alerted, it was felt by the framers, the nodding investiga-

tor had the chance to reconsider whether to press for an answer, thereby immunizing his witness. For, the statute provides, the only manner in which such immunity may be conferred is by overriding the assertion of the privilege by a direction to answer. In a grand jury context, this requires a request of the district attorney, a vote of the jury, and as the cases have held, an explanation to the witness that he is fully immunized [*People v. DeFeo*, 308 N. Y. 595 (1955)]. The witness is then immunized to the extent that he, in compliance with the order, answers or produces evidence. The immunity is conferred in exchange for the evidence.

Here the legal significance of a waiver of immunity may appear somewhat obscure. Under Section 2447, the most natural manner for a witness to waive immunity would seem to be simply to refrain from asserting his privilege. (Indeed, this seems to be the federal practice under their comparable immunity provisions. *E.g.*, 70 Stat. 574, 18 U. S. C. 1406.) The "waiver" executed in advance of testimony, then, might be deemed a mere unilateral promise to abstain from future assertion of the privilege. Of such scant legal significance, the waiver might be thought of as a relic only, an empty formality which could not bind the witness in derogation of his valuable privilege. Such, however, is not the case.

In 1959, in a brief and somewhat mystifying opinion, the New York Court of Appeals, 4-3, held that the potential defendant, called before a grand jury, receives from the moment of his oath protection against use of or indictment based upon his testimony [*People v. Steuding & Ryan*, 6 N. Y. 2d 214]. The provisions of Section 2447, it was held,

apply only to bona fide witnesses and do not detract from the automatic protection acquired by "targets" directly from the State Constitution. By returning potential defendants to the pre-2447 stage (and, realistically, immunity is a factor only in the testimony of potential defendants), the Court of Appeals revitalized the efficacy of the waiver of immunity. The waiver is, then, an operative instrument despite the holdings of cases following *Steuding* that immunity, in the full sense of the term, was not acquired by the target simply as a result of being sworn to testify [*People v. Laino*, 10 N. Y. 2d 161 (1961); *People v. Ryan*, 11 A. D. 2d 155 (1960) and 12 A. D. 2d 841 (1961) (upholding reindictment and conviction of defendant in *Steuding*)].

The wording of the waiver which Stevens executed (210 R.), while derived from the rather moribund Section 2446 of the Penal Law, is sufficiently broad to waive also whatever protection he would otherwise be accorded by operation of the *Steuding* doctrine. And, although the ritual dictated by Section 2447 is customarily followed, it is evident that *Steuding* type protection would attach when the oath is first administered. It is for this reason that a witness such as Stevens is informed at the outset that he is a potential defendant, apprised of the nature of the investigation, and advised of the option and its significance (210 R. 9-10, 13-15). It is only upon his recorded understanding and acknowledgment of the waiver that he is sworn.

By taking the oath, he accepts both the benefits and the obligations of his waiver. For it is obvious that should he choose to enjoy his privilege of silence, he could not be permitted to testify. Since by swearing the potential defend-

ant, the jury would be conferring immunity, virtual or literal, they would rightly decline to hear one whom the evidence might warrant charging with a crime.

In this light, it can readily be seen that the waiver of immunity is a legally significant choice, and as such, should not be regarded as revocable at will. And one who avails himself, willingly and with full appreciation of the possible consequences, of the privilege of appearing before those who will assess his conduct, can not retain the privilege of silence as well. Stevens was bound to fulfill the obligation he undertook, just as all of us living under a system of laws must honor the vows we have understandingly made.

Conclusion

Since the designated issue was not drawn in issue by the decisions below, *certiorari should be dismissed as improvidently granted*;

or

Since the holding of *Malloy v. Hogan* leaves the rationale of the *Regan* case wholly unaffected, and since the instant case is indistinguishable from *Regan*, on the authority of that sound and just result, *the judgment should be affirmed*;

or

If *Regan* be, on some account, inapplicable, *the cause should be remanded to the state court* for consideration of the merits of the contentions here raised;

or

Since the provisions of the New York Constitution and City Charter here challenged are not repugnant to the Constitution of the United States, and accordingly the petitioner's waiver of immunity was voluntarily executed, and was not thereafter unilaterally revocable, *the judgment should be affirmed*.

Respectfully submitted,

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January, 1966

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner*,
v.

CHARLES A. MARKS, Justice of the Supreme Court of
New York, County of New York, *Respondent*.

On Writ of Certiorari to the Appellate Division of the Supreme
Court, First Judicial Department in the
County of New York

No. 290

JAMES T. STEVENS, *Petitioner*,
v.
JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In reply to certain contentions advanced in the Respondents' Brief, petitioner submits the following:

I. This Court May Appropriately Exercise Its Jurisdiction to Consider the Constitutional Question as to Which Certiorari Was Granted

The respondents continue to urge that the constitutionality of Article 1, Section 6, of the State Constitution and of Section 1123 of the City Charter "was never drawn in question by the decisions of the courts below in either case, and hence the [constitutional] issue is not properly before this Court." Brief, p. 17. Reference is made in this respect to the fact that the courts below all felt that this Court's decision in *Regan v. New York*, 349 U.S. 58, was controlling and that the question as to the constitutionality of the provisions in question need not be resolved.

Such a contention misconceives both the nature of this Court's jurisdiction to consider the federal constitutional validity of state law provisions and the appropriateness of exercising that jurisdiction in this instance. The propriety of a constitutional issue being before this Court does not depend, as respondents would have it, upon that issue having been drawn in question "by the decisions of the courts below." Such propriety, at least with reference to state court decisions here on certiorari,¹ depends instead upon two factors (see 28 U.S.C. § 1257) :

¹ What is said herein relates primarily to No. 210, which is here on writ of certiorari to the Appellate Division of the New York Supreme Court. The jurisdictional necessity of a federal constitutional claim having been raised and necessarily decided is one that adheres to cases here on appeal or certiorari from state courts. 28 U.S.C. § 1257. No such jurisdictional requirement is mandated as to cases here on certiorari from federal courts of appeals, as is No. 290. See 28 U.S.C. § 1254. This Court's jurisdiction over judgments of lower federal courts is plenary, though the failure to raise an issue or the absence of a decision on the point involved may affect the exercise of the Court's discretion in granting or denying certiorari.

(1) The federal constitutional validity of the state law provisions must have been drawn in question in the courts below *by the protesting party*. Federal issues are raised by parties, not by the courts. In other words, "if a party intends to invoke for the protection of his rights the Constitution of the United States . . . he must so declare; and unless he does so declare 'specially' that is, unmistakably, this Court is without authority to re-examine the final judgment of the state court." *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655.

(2) The decision below must necessarily have invoked a resolution of the constitutional issue. But "it is not necessary that the ruling shall have been put in direct terms," as was said in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67. "If the necessary effect of the judgment has been to deny the claim, that is enough." *Ibid.*²

The first of these factors has been conceded by the respondents, who have acknowledged (Brief, p. 14) that the petitioner "persistently asserted" in the courts below that the employment forfeiture provisions in question were invalid under the federal Constitution. Such a raising of the federal question below completely distinguishes the cases relied upon by respondents, *Musser v. Utah*, 333 U.S. 95; *Adler v. Board of Education*, 342 U.S. 485, where this Court declined consideration of federal issues which had not

² A denial of the federal claim is jurisdictionally essential only as to cases here on appeal from state court judgments involving the validity of state statutes. See 28 U.S.C. § 1257(2). If such cases come here by certiorari, it matters not whether the state statute was held valid or invalid in light of the federal claim. See U.S.C. § 1257(3).

been properly presented by the parties in the lower courts.

The second factor—the necessary involvement of the federal question in the decision below—is equally satisfied in these cases. There is no claim, and indeed no basis for assuming, that the decisions below in any way rested upon an adequate state law ground. Reliance upon this Court's decision in *Regan* was in itself a federal ground of decision. But, more importantly, the refusal to decide the properly raised federal constitutional question on the theory that the *Regan* decision made such a resolution unnecessary in no way detracts from this Court's jurisdiction to decide the constitutional issue. If reliance on *Regan* was unfounded and if the Constitution protects the petitioner from the coercive impact of the state law provisions in question, "his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 282; and see *Greene v. Louisville & Interurban R. Co.*, 244 U.S. 499, 508; *Smith v. Cahoon*, 283 U.S. 553, 564. See also *Atchison R. Co. v. Public Utilities Commission*, 346 U.S. 346, 349.

Thus the constitutional question as to which this Court granted certiorari was inescapably involved in the decisions below despite the failure to resolve the properly raised contention. That very failure operated to deny petitioner's claimed constitutional rights. And, in the circumstances of these cases, it becomes appropriate for this Court to adjudicate this constitutional matter forthwith. That matter relates to the effect of the state law provisions on the free assertion of the federally-protected privilege against self-in-

crimination. The nature and scope of those provisions, providing for employment forfeiture should a public employee refuse to sign a waiver of immunity, are obvious on their face. No state court elaboration of their thrust could make their intendment any plainer. Indeed, the highest New York court has already interpreted these provisions to mean that "the assertion of the privilege against self incrimination is equivalent to resignation," *Daniman v. Board of Education*, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, and this Court has accepted that interpretation as authoritative, *Slochower v. Board of Education*, 350 U.S. 551, 554.

Any abstention by this Court at this juncture, pending a remand to the state courts for a resolution of the constitutional issue, would appear both unnecessary and unproductive in these circumstances. The sole constitutional question is whether these employment forfeiture provisions unduly infringe upon the freedom to assert or waive the federal privilege against self-incrimination. As to that issue this Court is necessarily the final arbiter. Nothing that the state courts could now say would make the issue any plainer or the task of this Court any lighter; to remand what has already been prolonged through three contempt proceedings would only delay unnecessarily the day of this Court's determination of an obviously important constitutional question—one that has been fully briefed by the parties in the instant cases.

The circumstances being what they are, this Court may appropriately proceed to resolve the constitutional question without further delay. See *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 302; *Griffin v. School Board*, 377 U.S. 218, 229; *Konigsberg v. State Bar*, 353 U.S. 252, 258; *Staub v. City of Baxley*, 355 U.S. 313.

**2. The Regan Decision, Being Premised on the Availability of
an Automatic Immunity That Is No Longer in Existence
Under New York Law, Is Not Controlling Here**

This Court's decision in the *Regan* case, which the lower courts thought to be dispositive of the instant ones, was expressly premised upon the availability of the immunity provided by § 381 of the New York Penal Law "as it existed at the time of this case." 349 U.S. at 59. At that time, § 381 provided unconditionally that no person testifying in a proceeding relating to bribery "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence. . ." That statutory provision, which was said to be "crucial in this case," 349 U.S. at 62, enabled this Court to conclude that even though the waiver be deemed invalid "the immunity from prosecution persists, and in the presence of such immunity petitioner's testimony could not possibly be self-incriminatory," 349 U.S. at 64.

But as this Court noted in *Regan*, 349 U.S. at 59, n. 2, § 381 was amended after the occurrence of the operative events in that case. So significant is the change in the immunity statute as to make the *Regan* decision totally inapplicable here.

Respondents seek to characterize the change wrought in New York law as "wholly without constitutional significance," being limited to a new requirement that the witness interpose a refusal to testify "before immunity may be conferred by a direction to answer." Brief, p. 24. Such is not the case. As the *amicus curiae* brief filed herein by the Superior Officers Council of the New York City Police Department

points out, the 1953 amendment to § 381 and the new § 2447 that was enacted at that time make the following constitutionally significant changes in the New York immunity scheme:

(1) Section 381 now provides that in any bribery investigation "the court, magistrate or grand jury or the committee, *may* confer immunity in accordance with the provisions" of § 2447 (Emphasis added). There is thus no absolute or automatic immunity attaching to the witness who testifies; the word "may" indicates that the immunity is discretionary with the governing body.

(2) Section 2447 provides that an investigating grand jury is among those "authorized to confer immunity" in a proceeding relating to bribery. But several procedural steps must be taken under the section³ before such immunity is conferred: (a) the witness must refuse to answer on the ground of possible self-incrimination; (b) the grand jury must then be "expressly requested by the prosecuting attorney to order such person to . . . answer"; (c) the grand jury must then order the person to answer; (d) the witness must then comply with the order to answer; and (e) thereupon "immunity shall be conferred upon him."

In short, as the New York Court of Appeals held in *People v. Laino*, 10 N.Y. 2d 161, 172, 218 N.Y.S. 2d 647, 656, the defendant, merely by testifying, no longer receives "automatic immunity for all time, as

³ Subsection 4 of § 2447 provides that immunity cannot be conferred on any person "except in accordance with the provisions of this section."

to 'any transaction, matter or thing' revealed by him, as he would have prior to the enactment of section 2447 of the Penal Law." To achieve complete immunity under the new statutory scheme, there must be "strict compliance with the procedural requirements" of § 2447. *Ibid.*

A statute that gives no automatic and unconditional immunity, of course, is a far cry from the constitutional premise of an effective immunity statute—one that affords "absolute immunity against future prosecution for the offense to which the question relates." *Counselman v. Hitchcock*, 142 U.S. 547, 586; and see *Albertson v. Subversive Activities Control Board*, 382 U.S. 70.⁴ And this selective or conditional immunity established by the amended § 381 and the new § 2447 is radically different from the automatic immunity conferred by the original § 381 in effect at the time Regan would have testified. Because and only because of that automatic immunity, which required no procedural preconditions, this Court was able to say in *Regan* that had Regan actually testified and had the waiver later been found to be invalid, his immunity would have been automatically established by virtue of the then § 381.

Obviously, such was not the case with petitioner. Had he gone ahead and testified and had it been established on a later prosecution that his waiver of immunity was invalid, petitioner would have been bereft of any immunity under the present New York statutory scheme. For complete immunity to have attached,

⁴ As to the ineffectiveness of an immunity conferred in the discretion of a court or prosecutor, in the absence of an absolute immunity statute, see *United States v. Ford*, 99 U.S. 594; *Isaacs v. United States*, 256 F. 2d 654, 661 (C.A. 8).

there would have had to be strict compliance with all the procedural requirements of § 2447 *at the time of the grand jury investigation* and both the prosecutor and the grand jury *at that time* would have had to be favorably disposed to granting immunity in return for the answers to the incriminating questions.

As detailed more fully in petitioner's main brief (pp. 27-29), the situation at the time of questioning petitioner was such as to preclude compliance with § 2447; the prosecutor and the grand jury had no thought of conferring immunity on petitioner. The whole atmosphere was one of holding petitioner to his waiver of immunity and insisting that he had lost any and all immunity from prosecution for matters revealed by any testimony he might give. As a result, the prosecutor made no effort to bring § 2447 into operation by expressly requesting the grand jury to order petitioner to answer; nor did the grand jury then order petitioner to reply to the incriminating question. And there is no basis for assuming that the grand jury in these circumstances would have been disposed to grant immunity with respect to any answer petitioner might then have given. The only complete immunity which New York law authorizes was never permitted to mature. Not having come into being at the time of the grand jury hearings, the immunity could not later attach so as to protect petitioner from a subsequent prosecution.

Thus the essential crutch of the *Regan* rationale—the absolute assurance that Regan would have received immunity had he testified—is completely absent here. Indeed, the failure of the prosecutor to establish the preconditions of immunity in accordance with § 2447 only confirms petitioner's thesis, developed in his main

brief (pp. 27-31), that the whole conduct of the grand jury procedure was inconsistent with any intent or belief or possibility that the New York immunity statute was applicable. As in *Raley v. Ohio*, 360 U.S. 423, petitioner received the type of treatment he would have been given had there been no immunity statute whatever in New York. The confusing entrapment which marked the *Raley* case, causing the defendants to believe there was no state immunity statute, finds a parallel here: petitioner was led to believe that no immunity whatever was possible by virtue of the waiver and yet that he could still "at any time" invoke his federal privilege against self-incrimination.

Respondents attempt (Brief, p. 28) to distinguish *Raley* by the unsupportable allegation that the petitioner herein was "punished for his stubborn adherence to a claimed privilege which he was explicitly and repeatedly told was unavailable." The record, however, plainly reveals that the Assistant District Attorney again and again told petitioner that he could "at any time" invoke his federal privilege against self-incrimination. See 210 R. 9-10, 13; 290 R. 13-14, 25-26, 29; these statements of the prosecutor are quoted in petitioner's main brief at pp. 7, 8, 27, 28. And on a fair and honest reading of this record, the *Raley* case is indistinguishable in terms of the unfair entrapment imposed on the respective witnesses.

The sum total of the factual situation and the drastic change in the statutory immunity provisions compels the conclusion that the *Regan* rationale—quite apart from the constitutional change wrought by *Malloy v. Hogan*—cannot be applied to dispose of these cases.

3. The Destruction of Petitioner's Freedom to Choose Between Speaking or Remaining Silent Renders Unconstitutional the Employment Forfeiture Provisions in Question

Respondents' answer to the critical constitutional question under review is that the requirement that a public employee answer pertinent questions concerning the performance of his duties, on pain of losing his job, is a fair and reasonable condition of continued public employment. Any distinction to be drawn in assessing that condition as between the assertion of the privilege against self-incrimination, the imputation of guilt or the demonstrated lack of candor is said to be "a semantic exercise only." Brief, p. 35.

Surely, however, this Court was not engaging in "a semantic exercise only" when it ruled in *Slochower v. Board of Education*, 350 U.S. 551, that New York could not constitutionally use these employment forfeiture provisions to cause the summary dismissal of a public employee for having invoked the privilege against self-incrimination before a congressional committee. In so ruling, the Court took pains to point out that "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State." 350 U.S. at 559. The Court thus recognized that the freedom of invoking the privilege could have two consequences, one prohibited and the other permissible: (1) New York could not summarily discharge Slochower for freely invoking the privilege, but (2) upon proper procedures, New York might be able to discharge Slochower for having acted in a manner inconsistent with some legitimate state interest. Such a

distinction, however, involves something far more fundamental than "a semantic exercise only."⁵

What concerned the Court in *Slochower* was the summary fall of "the heavy hand" of these provisions on public employees merely for freely exercising their constitutional privilege, "the full enjoyment of which every person is entitled to receive." 350 U.S. at 558. And so in the instant cases, "the heavy hand" of the provisions fall summarily on public employees precisely at the point when they are confronted with the constitutionally protected choice of speaking or remaining silent. By threat of the use of the summary aspects of those provisions, the State destroys the "unfettered exercise of his own will" which constitutionally must accompany that choice. And the alternatives are thereby significantly changed. Instead of the choice being freely exercisable between speaking or invoking the privilege, the forced choice is between the waiver of the right to remain silent and the loss of one's job immediately upon invocation of the privilege. There is no real freedom in being compelled to make such a "choice," particularly since *Slochower* has already outlawed the summary dismissal aspects of the "choice." But despite that outlawry, New York continues to use the threat of employment forfeiture, and indeed makes good on the threat, to circumscribe the freedom of choice available to the public employee confronted with an incriminating question. And New York is implementing that threat with criminal contempt proceed-

⁵ And this Court was not engaged in "a semantic exercise only" when it repeated the *Slochower* distinction in *Beilan v. Board of Education*, 357 U.S. 399, 408-409; and see *Lerner v. Casey*, 357 U.S. 468, 476-477.

ings for those who insist on invoking their federal privilege.

As respondents have indicated (Brief, p. 32), lower New York courts have heeded the *Slochower* ruling by ordering the reinstatement of police officers summarily dismissed for having refused to sign waivers of immunity in grand jury investigations. *Gardner v. Murphy*, 46 Misc. 2d 728, 260 N.Y.S. 2d 739; *Conlon v. Murphy*, 263 N.Y.S. 2d 360. They have done so on the theory that New York law, by force of the *Slochower* decision, must be read as requiring a full due process hearing and opportunity to explain as a predicate to dismissal. But that development in New York law cannot disguise the critical fact that the threat of summary dismissal—which remains explicit on the face of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution—is still being used to destroy the freedom in the first instance to invoke or waive the federal privilege against self-incrimination. Petitioner's experience stands as mute testimony of that fact.

The constitutional and charter provisions in question must accordingly be deemed invalid under the Fourteenth Amendment by virtue of their burden and restriction upon the freedom surrounding the invocation of the federal privilege against self-incrimination. Such a conclusion, to repeat, does not call into question the right of the State of New York to impose penalties, pursuant to procedural due process, upon those of its public servants who refuse to cooperate with lawful investigations into their public duties. All that New York is here proscribed from doing is encumbering the invocation of the federal privilege with threats of employment forfeiture and criminal contempt citations so as to force the public employee to waive the privilege.

Once the employee has been given complete freedom to speak or remain silent, which includes an awareness that some form of penalties may later be imposed if he invokes the privilege, it will be time to assess the constitutional power of New York, in the light of *Malloy v. Hogan*, to discipline or discharge the employee for having freely elected to remain silent.

There is nothing unique about a state's "internal managerial functions" in ferreting out "abuse among its own agents," as respondents would have it (Brief, p. 16), that justifies a state in discriminating against its employees in their assertion of a federal privilege. Just the contrary of respondents' position was established by *Wieman v. Updegraff*, 344 U.S. 183, and its progeny. And whatever power a state may have to compel the forfeiture of a constitutional right as a condition of public employment, that power is certainly exceeded when used to jail those employees who have sought freely to invoke a federal privilege.

The focus of these cases is upon the freedom that must surround the decision of a citizen to speak or remain silent when asked an incriminating question. At the point of making that decision, every person—every public servant, every policeman—must be accorded the right to make a choice "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8. To threaten employment forfeiture and contempt citation if the employee does not waive his federal privilege is to destroy that essential freedom. Therein lies the constitutional defect of the legislation in issue.

CONCLUSION

For these reasons, supplementing those advanced in petitioner's main brief, the judgments below should be reversed.

Respectfully submitted,

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January, 1966.

JAN 17 19

IN THE
Supreme Court of the United States,
DAVIS, C.
October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

—v.—

CHARLES A. MARKS, Justice of the Supreme Court
of New York, County of New York,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE
SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN
THE COUNTY OF NEW YORK

No. 290

JAMES T. STEVENS,

Petitioner,

—v.—

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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Respondent.

◆
**BRIEF OF AMICUS CURIAE IN SUPPORT
OF PETITIONER**

This brief amicus curiae, in support of the position of the petitioner James T. Stevens, is respectfully submitted by the Superior Officers Council of City of New York Police Department. The interest of the amicus curiae is stated in our motion for permission to file this brief.

Summary of Argument

1. All of the courts below in this litigation have been of the view that *Regan v. New York*, 349 U.S. 58, is con-

trolling against the position of the petitioner James T. Stevens, in that both in *Regan* and in this case the respective petitioners repudiated as constitutionally defective a waiver of immunity, each was thereafter adjudged in contempt of court for refusal to testify before a State Grand Jury, and each was found (by the lower courts here—and by this Court in *Regan*) to be without justification in refusing to testify because each had an absolute immunity under State law. The actual fact is, however, that while *Regan* involved State immunity legislation which did indubitably and *automatically* confer upon the petitioner an absolute immunity against State prosecution if he were to testify, in this case the situation is radically and dispositively different because the New York State immunity legislation which was applicable at the time of the *Regan* happenings has since been amended, so that now the New York State immunity legislation is of the selective and discretionary type rather than of the automatic or self-executing type. It follows that the present petitioner Stevens is entitled to claim justification for refusing to testify, notwithstanding the *Regan* decision, because it is a matter of pure speculation as to whether he will ever have New York State immunity. Indeed, judging by the strenuously declared determination of the prosecuting authorities throughout this case that Stevens is not to expect immunity, the supposed prospect of his obtaining immunity under the changed statutory system in New York for merely selective and discretionary immunity is not a meaningful prospect for the purposes of this case. The point summarized in this paragraph has thus far apparently not been noticed by any of the Courts below or by the parties in this litigation.

2. There exists also, under New York court-decisional law interpreting the New York State constitutional protection of the privilege against self incrimination, a doctrine that a prospective defendant who is brought and required compulsorily to testify before a Grand Jury, has thereby *ipso facto* suffered a violation of his privilege against self-incrimination, and is entitled to dismissal of any indictment derived from such compelled Grand Jury testimony. It is important for a full consideration of the issues of this case that this New York State decisional rule—which has not thus far been noticed, apparently, in this litigation—should not be simplistically or erroneously taken to mean that the petitioner Stevens enjoys an automatic State immunity in a sense of sufficient completeness for the purposes of this case. The New York decisional rule, upon examination, is found to be not a rule of complete immunity, but it is a rule which leaves the defendant (or prospective-defendant Grand Jury witness) subject to subsequent re-indictment based upon sufficient evidence not derived from the unconstitutionally compelled testimony. Besides, this incompleteness in the “immunity” conferred under the New York State decisional rule is rendered even more incomplete for *Federal* constitutional purposes when consideration is had of this Court’s decisions in *Murphy v. Waterfront Commission*, 378 U.S. 52 and *Malloy v. Hogan*, 378 U.S. 1, establishing a requirement of completely mutualized immunity against Federal and State incrimination tested by Federal Fifth Amendment standards; and when consideration is had of subsequent Federal court decisions holding in the most emphatic terms that the New York decisional rule in question does not and cannot create Federal immunity under Fifth Amendment standards.

ARGUMENT

POINT I

The case of *Regan v. New York*, 349 U.S. 58, which has been deemed by all of the Courts below to be controlling against the position of the petitioner James T. Stevens, is not controlling because the *Regan* decision turned dispository upon a therein operative "automatic immunity" New York statute which is now no longer in existence, and the New York State Immunity Legislation which needs to be considered for the present case is a selective and discretionary (rather than "automatic") immunity system. This statutory change means that the within petitioner Stevens, unlike the petitioner in the *Regan* case, can claim justification for refusal to testify on the ground that he is not assured of immunity as the *Regan* case petitioner was.

Throughout this litigation in all of the Courts below it has apparently been assumed, both by all of the Courts and by the parties, that the same New York State immunity legislation which was involved in *Regan v. New York*, 349 U.S. 58, is also involved in this case. This assumption is incorrect, and the error is cardinal.

The State immunity legislation in the *Regan* case was N.Y. Penal Law § 381 *as it then existed* (New York Laws 1936, ch. 329) (quoted *infra*), an immunity statute of the "automatic" or self-executing type—i.e., it was a statute providing that testimony relating to bribery (or related crimes) could not be withheld on the ground of self-incrimination, but it conferred immunity from prosecution for any criminal activity revealed in such testimony. Because of the

applicability of that "automatic" or "self-executing" immunity statute in the *Regan* case, this Court in that case held that the petitioner there had no possible justification for refusal to testify on the ground of defectiveness in his waiver of immunity, inasmuch as the automatic statutory immunity must absolutely protect him if he testified, and the Court reasoned that this was true irrespective of the merits of the claim of defectiveness of the waiver of immunity—the only qualifying point which the Court there suggested being that if the waiver was not defective the loss of immunity "would be simply the result of a voluntary choice to waive an immunity provided by the State" (349 U.S. at p. 631).

In the instant case the New York immunity statutes which need to be considered are N.Y. Penal Law §381 *as amended* (New York Laws 1953, ch. 891, § 5) plus N.Y. Penal Law § 2447 (New York Laws 1953, ch. 891, § 1) (both of these statutes are quoted *infra*). These statutes are radically, and (for the purposes of this case) decisively, different from the New York immunity legislation in *Regan*. The statutes in the instant case create a system of discretionary and selective immunity. And, as will shortly appear, under these statutes the within petitioner Stevens must be regarded as being just as absolutely *unsure* of immunity, as the petitioner in *Regan* was deemed absolutely *sure* of such protection.

N.Y. Penal Law §381 (New York Laws 1936, ch. 329) as it stood at the operative times in the *Regan* case, read in pertinent part as follows:

"* * * No person shall be excused from attending and testifying * * * upon any * * * proceeding * *

relating to or concerned with a violation of any section in this chapter relating to bribery * * *, upon the ground [of self incrimination]; but no person shall be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial."

The above quoted §381 as adopted in 1936 was amended for the first time by New York Laws, 1953, ch. 891, §5, effective September 1, 1953.* This amendment was part of a comprehensive overhauling of the New York State immunity legislation with the object of ending "immunity baths" under the automatic or self-executing type of immunity laws, and of setting up instead a system for selective or discretionary conferral of immunity in cases deemed appropriate by a "competent authority"; see the explanation of this fundamental legislative policy change in *People v. Laino*, 10 N.Y. 2d 161, 172, 218 N.Y.S. 2d 647, 656-657 (1961). The 1953 amendment of §381 (and of several other similar provisions in the Penal Law) was enacted by the New York Legislature in conjunction with the adoption of an entirely new provision, N.Y. Penal Law §2447. The *amended* §381 (which is still in force and is applicable here) reads in pertinent part as follows:

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating

* The troubles of the petitioner in the *Regan* case arose out of Grand Jury proceedings in March 1951, and October, November and December 1952 (349 U.S. at pp. 60-61).

to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

N.Y. Penal Law §2447, the basic new provision adopted in 1953 to establish the selective immunity procedure, will be quoted in full:

"Witnesses' immunity"

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in

producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

- (a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or
- (b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of any of them in his official capacity, is a party when such court is expressly requested by the attorney general of the state of New York to order such person to give answer or produce evidence; or
- (c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce answer; or
- (d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence at an inquiry or investigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full

membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein. Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred on any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

Thus, by reading together the amended §381 and the provisions of §2447, we see that a Grand Jury bribery investigation (§381) is one in which the Grand Jury is "a competent authority * * * authorized to confer immunity" (§2447). And we see further that this selective immunity system involves certain definite procedural steps—the witness must refuse to answer on the ground

of self incrimination, the Grand Jury must be "expressly requested by the prosecuting attorney to order such person to * * * answer", the Grand Jury must then order the person to answer, the person must then comply with the order, and only after all of these steps "immunity shall be conferred upon him". The strictness with which the Legislature intended that these procedures must be followed is indicated by the above quoted sub-division 4 of section 2447—"Immunity shall not be conferred upon any person except in accordance with the provisions of this section".

The Court of Appeals of New York, in construing this §2447 and in contrasting it with the former "immunity bath" system (which was in effect at the operative times in the *Regan* case), has said:

" * * * Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted * * *, or by virtue of immunity provisions in our State Constitution * * *" (*People v. Laino*, 10 N.Y. 2d 161, 173, 218 N.Y.S. 2d 647, 657).

In the present case of petitioner Stevens, the factual and legal situation stands a long way removed indeed from any absolute assurance of immunity for Stevens under the detailed procedures of §2447. The only one of the required statutory steps which has occurred is that Stevens has refused to answer on the ground of self incrimination. But nothing else that is required by §2447 has happened in this case. The prosecuting attorney has not "expressly

requested" the Grand Jury "to order such person to * * * answer" with a view to carrying forward the immunity-conferral procedure under §2447—on the contrary, the prosecuting authorities in this case are strenuously resisting any idea that Stevens in fact has or is going to have immunity. Nor, of course, has the Grand Jury taken the next statutorily required step of ordering Stevens to answer with a view to immunity conferral under §2447—again, to the contrary, the entire thrust of the respondents' position in this case has been and continues to be that Stevens is not going to be given immunity, he is being held to his alleged waiver of immunity.

Since the prosecuting authorities in this case have so firmly been adhering to their policy of non-immunity for Stevens, is it not going to require a profound policy reconsideration on the part of those authorities before they might ever make a policy turnabout in favor of recommending to a Grand Jury an immunity-conferral on Stevens? And is it not therefore altogether unrealistic to say that by virtue merely of the existence on the New York State statute books of Penal Law §2447 Stevens is even so much as speculatively "assured" of the kind of immunity protection that was deemed decisive in the *Regan* case, much less absolutely assured thereof as Regan was held to be?

Also, who can say what a particular Grand Jury will do, regarding the hypothetical possibility of a future prosecutor's recommendation or request that the §2447 selective immunity procedures be applied to Stevens? Is it to be assumed that New York State Grand Juries will pre-

dictably be mere puppets of the prosecuting authorities? Is that what the Legislature of New York had in mind when it so elaborately defined (in §2447) the conditions under which a Grand Jury might qualify as a "competent authority" for the conferral of the potent new selective immunity that the Legislature wanted in place of the prior "immunity bath" system?

If §2447 means that Grand Juries are puppets of prosecuting attorneys, then do we not face the further distressing problem—and it is a problem of constitutional dimension—that the dread power of immunity-conferral, the power of wiping out a citizen's independent choice as to exercise of his privilege against self incrimination and of being let alone when he chooses to remain silent in reliance upon this great privilege, is a power which in New York State Grand Jury proceedings is at the untrammeled disposal of every zealous local prosecutor?

In short, the problems of constitutional policy and constitutional procedure (both State and Federal) which are projected by any such idea as that the present Stevens case is the same as the *Regan* case in point of a supposed identity of the respective New York State immunity provisions involved, are problems of a dizzying complexity and of a deeply disturbing character in constitutional terms.

There was a good, old-fashioned simple sort of indubitably "automatic immunity" in the *Regan* case, and that circumstance was deemed by this Court to be dispositive of Regan's claim that he was afraid to testify because he was not sure he would have immunity. But here, there is

at best some kind of remote and speculative possibility that Stevens may get immunity under §2447—indeed, as above suggested, every realistically likely indication is that the last thing which the respondents in this case (or rather the prosecutive authorities involved) are planning for Stevens is a conferral of immunity from prosecution.

In its decision in the *Regan* case this Court revealed, we think, a perfect awareness of the exact impingement of the New York immunity legislation which was there involved, and of the possible implications of the New York statutory change which had come into effect during the course of the later stages of the *Regan* litigation—though not early enough to affect the decision in that case. Thus, in its initial reference to N.Y. Penal Law §381 in the form in which it existed for the operative purposes of the *Regan* case, this Court commented that it was referring to that statute “as it existed at the time of this case” (349 U.S. at p. 59) and in an immediately accompanying footnote the Court said, of §381 and certain similar New York State automatic immunity provisions, that “these statutes have since been amended. New York Laws 1953, ch. 891” (349 U.S. at p. 59, fn. 2).

Throughout its opinion in the *Regan* case this Court kept emphasizing the point that §381 (“as it existed at the time of this case”) stripped the petitioner of justification for refusal to testify, because “The immunity statute is crucial in this case because it removed any possible justification which petitioner had for not testifying. * * * The statute would have provided him with immunity * * * and thus his testimony could not possibly have been self incriminatory”

(349 U.S. at p. 62)*; and because the question of whether the waiver of immunity (*in Regan*) was valid or invalid "is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired" (349 U.S. at p. 62); and because "If the waiver is invalid, the immunity from prosecution persists" (349 U.S. at p. 64). Likewise in the concurring opinion of Mr. Chief Justice Warren in *Regan* (joined by Mr. Justice Clark) it was stated that, "This Court has never held that a State, in the absence of an adequate immunity statute, can punish a witness for contempt for refusing to answer self incriminatory questions. A case involving such facts has never been presented here. Nor is this such a case, since New York, by §381 of the Penal Law, has granted immunity" (349 U.S. at p. 65).

We therefore submit that the 1953 change in the New York State immunity legislation renders the *Regan* decision wholly inapplicable to the facts of this case.

* At this point in the opinion the Court had a footnote reading, "Petitioner does not challenge the sufficiency of the immunity provided" (349 U.S. at p. 62, fn. 7). As amicus curiae we here respectfully urge that the "immunity provided" for Stevens is definitely insufficient, not only because the statutory (§ 2447) immunity is merely remote and speculative as above stated, but also because the only other possible "immunity" (the non-statutory "immunity" discussed in our Point II, *infra*) is unquestionably insufficient to confer immunity against Federal prosecution within the meaning of *Murphy v. Waterfront Commission*, 378 U.S. 52.

POINT II

Petitioner Stevens' justification for refusal to answer is not diminished by the decisional rule of law in the New York State Courts that the compelling of Grand Jury testimony on the part of a prospective defendant works a violation of the privilege against self incrimination and raises up a limited form of "immunity."

In our Point I, *supra*, we have aimed at showing that petitioner Stevens does not enjoy, under the presently operative New York State immunity statutes, that kind or degree of assurance of immunity which this Court found in the *Regan* case. In this Point II our purpose is to show that petitioner Stevens likewise does not have, for the purposes of this case, any such assurance of immunity merely by virtue of the New York rule of decisional law referred to in the above point heading.

The most recent and the most comprehensive decision of the Court of Appeals of the State of New York dealing with the rule of decisional law in question—that the compelling of Grand Jury testimony from a prospective defendant violates the privilege against self incrimination and works a limited "immunity" result—is *People v. Laino*, 10 N.Y. 2d 161, 218 N.Y.S. 2d 647 (1961). Two years prior to the *Laino* case the New York Court of Appeals had reenunciated the foregoing rule and had affirmed an order dismissing an indictment returned by a Grand Jury which had compelled testimony from a prospective defendant. *People v. Steuding*, 6 N.Y. 2d 214, 189 N.Y.S. 2d 166. The *Steuding* decision had left open the question of whether, beyond the dismissal of the particular Grand Jury indictment

thus obtained, it must also be concluded that such a prospective defendant who had thus been compelled by a Grand Jury would thereby become cloaked with a plenary immunity for all possible future re-indictments deriving from the same Grand Jury subject matter of testimony of the witness. In the *Laino* case, *supra*, the Court of Appeals carried the *Steuding* principle one step further—but only one step further. For the Court of Appeals in *Laino* held that a person who (being a prospective defendant) had been compelled to testify before a Grand Jury concerning a particular area of crime-investigation (violation of municipal competitive bidding requirements), was entitled to dismissal of an indictment for income tax evasion deriving from that same Grand Jury-compelled testimony. In other words, *Laino* held that there did arise from such Grand Jury-compelled testimony a form of "automatic immunity" which went beyond immunity from prosecution for the particular subject matter of the Grand Jury investigation. However, the New York Court of Appeals in the *Laino* case went to very explicit pains to make it clear that this was not "complete immunity". The Court in *Laino* noted that the selective immunity under §2447, and the decisionally enunciated (constitutionally-founded) immunity mentioned in the *Steuding* case as attaching to a prospective defendant who had been compelled to testify before a Grand Jury, were wholly distinct and separate from each other. Thus, referring to the *Steuding* rule, the Court said, "This, however, is a different thing entirely from complete immunity, and re-indictment is possible if sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant, is adduced to support it * * *. Complete immunity from prosecution may be obtained by

a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted [*viz.* N.Y. Penal Law §2447 plus, e.g., §381], or by virtue of immunity provisions in our State Constitution" (10 N.Y. 2d at p. 173).* The Court in *Laino* then went on to hold that the tax-evasion indictment must be dismissed.

And that was all that the Court held in the *Laino* case. It did not hold that *Laino* got complete immunity for all matters concerning which he had testified before the Grand Jury. In order to have got that complete kind of immunity, in other words, *Laino* would have had to receive the benefits of the selective and discretionary immunity procedures of N.Y. Penal Law §2447.

The New York decisional rule of constitutional law with which the *Steuding* and *Laino* cases were concerned, then, gives a man nothing more than the right to obtain dismissal of an indictment or indictments which are traceable to his Grand Jury-compelled testimony. If the prosecuting authorities can develop "sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant" in his Grand Jury testimony, he does not have that complete immunity which he would have under §2447.

And in fact Mr. *Laino* himself lived to experience the harsh reality of this limited "immunity" of the *Steuding-Laino* rule. For he was subsequently re-indicted, and his efforts at seeking relief against this renewed State prosecution proved fruitless both in direct review proceedings (including a certiorari application in this Court) and in

* The second of the above two quoted sentences has previously been quoted in this brief in another connection.

Federal habeas corpus proceedings; the judicial history of Laino's further ordeal is recited in *United States ex rel. Frank Laino v. Wallack*, 231 F. Supp. 733 (S.D.N.Y. 1964).

We therefore submit that the *Steuding-Laino* rule, any more than the supposedly or potentially "available" selective immunity provisions of N.Y. Penal Law §2447, does not hold forth to the within petitioner Stevens any constitutionally cognizable prospect (for the purposes of this case) of that kind of absolute and complete immunity which this Court deemed decisive in the *Regan* case.

But this is not all—as regards the question of the *Federal* constitutional effectiveness of the *Steuding-Laino* rule for the purposes of the present case, i.e., for the purpose of determining whether the supposedly "available" "immunity" of petitioner Stevens on the present record equals or sufficiently approximates the absolutely dependable New York State immunity which was deemed decisive in *Regan*. Petitioner Stevens' brief on the merits in this Court points out the larger significances of *Malloy v. Hogan*, 378 U.S. 1, as calling for a reconsideration of the impact of *Regan* on the basic constitutional issue in this case of whether State constitutional or statutory discrimination against public employees in the matter of their constitutional privilege against self incrimination is to be countenanced any longer. The supplemental thought which we, as amicus curiae, would now respectfully propose for this Court's consideration in connection with this theme as to the larger effects of *Malloy v. Hogan* is, that additional attention should be directed also to the companion (with *Malloy*) case of *Murphy v. Waterfront Commission*, 378 U.S. 52, in the following respects:—The *Murphy* decision

held, in essence, that a State grant of immunity is constitutionally inadequate unless it results in plenary protection against Federal as well as State incrimination. The *Murphy* doctrine may be formulated (if we may so put it) as a doctrine of the mutualizing of the requirements of State and Federal immunity-conferrals. It is therefore of the utmost interest, we think, that in the comparatively brief time since the *Murphy* and *Malloy* decisions authoritative Federal judicial spokesmen have declared, in the most express manner, that the New York State *Steuding-Laino* rule—whereby a New York State Grand Jury prospective defendant receives some measure of State immunity by reason of being compelled to testify—is, in effect, of no interest to Federal courts or to Federal prosecutive authorities. Thus, in *United States v. Winter*, 348 F. 2d 204 (C.A. 2 1965—opinion by Weinfeld, D.J. sitting by assignment with Circuit Judges Moore and Anderson), the Court of Appeals for the Second Circuit announced with almost indignant emphasis that New York's *Steuding-Laino* rule is not the rule in Federal criminal law enforcement, i.e., that Federal Grand Jury investigations are not subject to the potential infirmity of losing their “prospective defendants” through a legally automatic conferral of some degree of immunity by virtue of the mere act of compelling the witness to appear and testify. Of even more direct import in this connection is *United States v. Interborough Delicatessen Dealers Association, Inc.*, 235 F. Supp. 230 (S.D.N.Y. 1964—Levet, D.J.), decided very shortly after the *Murphy-Malloy* decisions of this Court, holding that the New York *Steuding-Laino* rule of “immunity” does not meet Federal Fifth Amendment standards and consequently cannot raise up a mutualized Federal-State immunity.

The point of all of this last discussion of ours concerning the *Steuding-Laino* rule vis a vis the *Murphy-Malloy* principles is that—in view of (and since) the decisions in the *Murphy* and *Malloy* cases—the question of whether the within petitioner Stevens possesses anything even remotely resembling the absolutely assured immunity protection which this Court deemed decisive in the *Regan* case, is a question which cannot be satisfactorily resolved without considering in the most thorough manner the problem of mutualization of Federal and State immunity. What could be more obvious than that petitioner Stevens, had he testified before the Grand Jury without receiving a complete Federal-State immunity, would have faced the altogether realistic danger of Federal criminal prosecution under the income tax statutes, as just one example of the “reasonable fear of Federal incrimination” which he could justifiably entertain—not to mention the imponderables of potential prosecution for other Federal crimes such as conspiracy, and whatnot. Cf. *Mills v. Louisiana*, 360 U.S. 230.

And still even this is not all, for in the suggestions which we are now to offer (and in which we shall have to touch with some slight repetition on one or two of the themes already above mentioned) it will be apparent, we venture to say, that even if this were a case which hinged upon some kind of realistically imminent “availability” of the selective immunity procedures of N.Y. Penal Law §2447 rather than hinging actually and only upon the even more parlous “available immunity” emanating from the *Steuding-Laino* rule, petitioner Stevens’ “prospects” of a meaningful Federal-State mutualized immunity would scarcely be enviable:

As we read the *Malloy* and *Murphy* decisions of this Court, the law of self-incrimination and immunity-conferral in this country now is that the States, in these matters, are bound to comply with the standards of the Fifth Amendment. One necessary effect of the *Malloy* and *Murphy* decisions is that State law and State procedures in the conferral of immunity from prosecution (as a means of overriding a claim of the privilege against self-incrimination) will have to satisfy the standards of the Fifth Amendment, the same as Federal statutes and processes for such immunity conferral must satisfy the standards of that Amendment. The *Murphy* and *Malloy* decisions did not indicate how this process of testing out the Federal constitutional adequacy of State immunity procedures would be approached in future cases, but it is not too difficult to foresee the general direction that such developments must inevitably take. The essential holding of *Murphy*, as we above said, is that a State grant of immunity is constitutionally inadequate unless it results in plenary protection against Federal as well as State incrimination. One obvious result of his holding is that the immunity conferral powers of the States have now become immeasurably more potent than was true prior to the *Murphy-Malloy* decisions because it now lies within the power of State immunity conferral agencies to tie the hands, so to say, of the Federal prosecuting authorities every time the State agency sees fit to exercise its own State immunity processes upon an individual. This, in turn, makes it not at all difficult to foresee that diligent and responsible Federal prosecuting authorities whose hands in any particular matter have been tied or supposedly tied by a State conferral of immunity will feel themselves in duty

bound to scrutinize with all closeness and circumspection the legal and constitutional adequacy of the State immunity procedure employed in the particular case, lest otherwise the area of Federal criminal law enforcement be whittled away by an indiscriminate process of procedurally slack or otherwise legally or constitutionally insufficient State-immunity conferrals. It may be foreseen as an indubitable certainty, then, that in many instances in the future Federal prosecuting authorities will feel themselves called upon to examine closely into the question of whether particular State conferrals of immunity are not only in compliance with the Federal Fifth Amendment standards in the sense in which the Federal Government's own immunity conferrals must obey those standards, but also, from the standpoint of whether the State immunity is, taken in its overall procedural and legal character, of such a quality as to satisfy the following two tests: (1) Does the State immunity satisfy all of the requirements of the law of the State itself? (2) Is the State immunity process involved of such an all-around quality in point of legality and constitutionality (both State and Federal) as well as satisfying other policy requirements of Federal law enforcement, as to justify the acceptance thereof by Federal prosecuting authorities and Federal courts for the purposes of wiping out the right of Federal prosecution?

For example, let us suppose that a particular State immunity statute allowed a State Grand Jury to confer immunity and it is shown in a particular case that the Grand Jury foreman alone, without the assent of the other grand jurors, had taken it upon himself to confer the immunity. This would involve a violation of the State law itself, rendering the immunity invalid, and thereupon it is obvious

that Federal officials and Federal courts would be justified and indeed obliged to treat such abortive conferral of State immunity as being ineffective to bar Federal prosecution.

Let us take another example: Let us suppose that there exists a State statute permitting any individual policeman to confer immunity upon any suspect in any informal police interrogation. Even supposing, further, that such a hypothetical State statute would be constitutional under the terms of the particular State Constitution hypothetically involved, is it conceivable that Federal prosecuting authorities and Federal courts would sit by and remain content with such a slack and indiscriminate State immunity-conferral process whose consequences would entail not only the prevention of State prosecution but also of Federal prosecution?

Cf. the language of Mr. Justice White's concurring opinion (in which Mr. Justice Stewart joined) in the *Murphy* case, *supra*, at 378 U.S. 98-99, where the vital interests of the Federal Government in preventing slack, indiscriminate or unauthoritative immunity-conferrals which would bar federal prosecution are emphasized.

As mentioned *supra*, in *United States v. Interborough Delicatessen Dealers Association Inc.*, 235 F. Supp. 230 (S.D.N.Y. 1964), the New York State "automatic" immunity under the *Steuding-Laino* rule was held not binding upon Federal prosecutive officials on the ground that the *Malloy-Murphy* decisions did not operate to thwart Federal prosecution through the Federal-State immunity-mutualization rule of those cases unless the particular State immunity satisfied Federal Fifth Amendment standards. Here, with a vengeance, has starkly appeared, and within a very short

time after the handing down of the *Malloy-Murphy* decisions, precisely the peril of which we have been speaking in these last paragraphs, i.e., the peril to a witness in State immunity-conferral proceedings that he may still face federal prosecution, the very "whipsaw" that the *Murphy-Malloy* cases were designed, it seems, to abolish.

We therefore respectfully submit that any supposedly available New York State immunity for petitioner James T. Stevens in this case, as supposedly being something which makes this case even remotely comparable to the *Regan* situation in point of some sort of absolutely assured immunity which supposedly destroys Stevens' justification for refusal to testify, is no more substantiated by the *Steuding-Laino* rule of the New York courts than by the herein relevant New York immunity statutes (N.Y. Penal Law §§381 and 2447) as contrasted with the pre-September 1953 New York legislation which was deemed by this Court to be decisive in the *Regan* case.

CONCLUSION

It is respectfully submitted that the judgments below in No. 210 and No. 290 should be reversed.

Respectfully submitted,

HERMAN VAN DER LINDE
ABRAHAM GLASSER

*Attorneys for Superior Officers
Council of City of New York
Police Department, Amicus
Curiae.*

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965
No. 290

JAMES T. STEVENS, PETITIONER,

vs.

JOHN J. McCLOSKEY,
SHERIFF OF NEW YORK CITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

65 Civ. 400

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

For a Writ of Habeas Corpus to inquire into his detention
by JOHN J. McCLOSKEY, Sheriff of New York City.

PETITION FOR A WRIT OF HABEAS CORPUS—

Filed February 8, 1965

To: The Honorable Judges of the United States District
Court for the Southern District of New York.

1. That he is the applicant above named and is now imprisoned and restrained of his liberty by the Sheriff of the City of New York in the State of New York, County of New York.
2. That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your petitioner is an order of the Honorable Mitchell D. Schweitzer, a Justice of the Supreme Court of the State of New York, in and for the County of New York, made on the 15th day of January, 1965, adjudging petitioner guilty of criminal contempt (copy of Mandate attached—Exhibit 1) in which he was sentenced to a term of 30 days and a fine of \$250.00 and in default thereof to serve an additional term of 30 days.
3. Your petitioner has previously served two separate 30-day terms and paid the fine of \$250.00 on each sentence by the same Supreme Court of New York County in which he appeared before the same Grand Jury and was asked the sole and identical question as the one that is now in the

Mandate confining him for a third time in the County Jail. The repetition of such question was in violation of Double Jeopardy clause of the Federal Constitution.

4. The Mandate of Order adjudging him guilty of Criminal Contempt dated the 30th day of July, 1964, signed by the Hon. Charles Marks, a Justice of the Supreme Court [fol. 2] (copy of mandate attached—Exhibit 2) was affirmed on appeal to the Appellate Division (253 N.Y. 2d 401) of the Supreme Court, First Judicial Department on the 30th day of October, 1964, (copy of the Order and Decision attached—Exhibit 3) and thereafter a motion was made to the same Appellate Division for leave to appeal to the Court of Appeals of the State of New York, which leave was denied. A motion was then made directly to the Court of Appeals of the State of New York asking for leave to appeal which motion was denied in a telegram received from the Court of Appeals on the evening of February 4, 1965.

5. Accordingly, your petitioner respectfully submits that all remedies available in the Courts of the State of New York have been exhausted.

6. The underlying facts leading to the issuance of the aforesaid application of criminal contempt of Court are as follows:

7. The First June 1964 Grand Jury of the County of New York commenced an inquiry to determine whether crimes of conspiracy to bribe a Public Officer and bribery of a Public Officer were committed in connection with enforcement of the gambling laws of the State of New York.

8. On the 25th day of June 1964, at 9:30 A.M., the petitioner, then a Lieutenant of the New York City Police Department was given a subpoena as a witness to report immediately to the New York County Grand Jury. A superior officer, Captain Jones, was assigned to take him to the Grand Jury. Outside the Grand Jury Petitioner signed a limited waiver of immunity on the advice of the Assistant

District Attorney that he would lose his job if he failed to sign the Waiver. After signing the waiver outside the Grand Jury, the petitioner was brought before the Grand Jury and advised that he was now a possible defendant. No testimony was taken at that time except his identifying him-[fol. 3] self by name, address, rank and police command; nor was any relevant testimony ever given by him.

9. On his return on July 15, 1964, petitioner now for the first time was represented by counsel and when he was asked to sign a new limited waiver of immunity before the July Grand Jury, he refused. He asked at that time to withdraw the waiver he had signed before the June Grand Jury which he had signed on the advice of the Assistant District Attorney, stating he had been denied the right to counsel when he signed that waiver.

10. On July 16th, he received a letter from the Chief Clerk of the New York City Police Department informing him that his position as a Lieutenant with the New York City Police Department had been taken away from him because he refused to sign a limited waiver of immunity before the July Grand Jury.

11. An Article 78, which was brought in the New York County Supreme Court (Index No. 16871/64) by the petitioner against Michael J. Murphy, as Police Commissioner, to restore him to the title and position of Lieutenant with full pay and allowances retro-active to the date of dismissal. The Corporation Counsel of the City of New York, appearing as attorney for the Police Commissioner, in answer to the petition, has offered the petitioner his former position with full back-pay from the date of his removal.

12. Thereafter, on July 22, 1964, he was subpoenaed to appear before the original June Grand Jury and on that day he informed the Grand Jury that he had received notice that he was no longer a member of the New York City Police Department and his attorneys advised him that he had the Constitutional right not to testify unless he was

given immunity. He was then brought before the Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who knowing that the petitioner had not received immunity, demanded that he [fol. 4] answer the question since he had previously signed a limited waiver. The Court and the District Attorney refused to allow him to withdraw this waiver even though he was not represented by counsel and the advice given to him by an Assistant District Attorney, which amounts at most to a coerced waiver. Your petitioner has never been given a hearing to show the surrounding circumstances which led to his signing the purported waiver on June 25, 1964. The question asked by Hon. Charles Marks on July 22, 1964, is the same question asked by Hon. Mitchell D. Schweitzer on the 26th day of September, 1964, and again on the 11th day of January, 1965, which has caused your petitioner to be sent to Civil Jail on three occasions. That question is:

"Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

13. Your petitioner on all three occasions informed the Grand Jury and the Court that he was relying on his attorneys' advice not to answer any questions since no immunity was offered and that he intended to avail himself of the Constitutional guarantees provided by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

14. The District Attorney of the County of New York, under the guise of citing the petitioner for contempt of Court, is in fact using and abusing laws of the State of New York in an attempt to deprive the petitioner of the equal protection of the laws and to deprive him of his rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States. The Courts of the State of New York

have failed to accord to Petitioner his Federal Privilege against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution as laid down by the Supreme Court of the United States in its decision of June 15, 1964, in the case of *Malloy v. Hogan* [fol. 5] (378 U.S. 1).

14. A previous application for a Writ of Habeas Corpus was made to this Court on the 5th day of August, 1964, when petitioner was imprisoned on the first contempt. The Hon. William B. Herlands in a Memorandum Opinion dated the 14th day of August, 1964, (copy attached—exhibit 4) denied the Writ principally because petitioner had not exhausted his State remedies. The Court, however, did recognize the far ranging Constitutional issues posed and stated it would require extensive research and mature deliberation, and thought it undesirable to rush in and summarily adjudicate these issues in a judicial race.

15. Your petitioner has exhausted all his remedies available to him in the State Court on his first Criminal Contempt and the petitioner as a practical matter cannot secure any relief except by this Court granting the Petitioner's writ. The only method by which your petitioner could proceed in the State Court is by an Article 78 proceeding and it would be impossible to secure a review in the State Courts within thirty days hence he is left without any remedy on these series of continuing attempts, except by this writ.

Wherefore, your petitioner prays that a writ of habeas corpus be issued directed to the Sheriff of the City of New York, State of New York, County of New York, commanding to have the body of petitioner, James T. Stevens, together with the cause of such imprisonment and restraint forthwith before the Court or officer granting said writ.

James T. Stevens.

Duly sworn to by James T. Stevens jurat omitted in printing.

[File endorsement omitted]

[fol. 6]

EXHIBIT 1 TO PETITION

At a term of the Supreme Court in and for
the County of New York; Part 30,
thereof, June 1964 Term, at Criminal
Courts Building, 100 Centre Street,
Borough of Manhattan, City and
County of New York, on the 15 day of
January, 1965.

PRESENT:

Honorable MITCHELL D. SCHWEITZER,

Justice.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JAMES T. STEVENS, a witness before the First June, 1964
Grand Jury of the County of New York.

Mandate of Order Adjudging Witness Guilty of Contempt.

The Grand Jury heretofore in due form of law selected,
drawn, summoned and sworn to serve as Grand Jurors in
the Supreme Court of the County of New York, and now
actually acting as the Grand Jury in and for the body of
the said County of New York, come into court and make
complaint by and through their foreman, theretofore duly
appointed and sworn, and it appearing to the satisfaction
of the court that James T. Stevens, on January 11, 1965,
after being duly summoned and sworn in the manner pre-
scribed by law as a witness, in a certain matter pending
before such Grand Jury whereof they had cognizance,
against John Doe et al., for the crimes of Conspiracy to
Bribe a Public Officer and Bribery of a Public Officer did
then and there refuse to answer legal, proper and relevant

questions which were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

[fol. 7] The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

Q. What is your full name?

A. With the rank?

Q. Yes.

A. Lieutenant James T. Stevens.

Q. And where are you assigned?

A. 11th Division, Brooklyn.

Q. And you are a police officer of New York City Police Department?

A. I am. I am.

Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

A. I do.

Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that?

A. I do.

[fol. 8] Q. Do you understand further that under the

New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?
A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engerts E-n-g-e-t-s, Avenue Brooklyn?

A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engerts Avenue, Brooklyn—" There appears to be a signature, "James T. Stevens," is that the—you signature?

A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you?

A. I did, sir.

[fol. 9] Q. And you understand the import of it?

A. I do.

Q. And was this signed in the presence of a notary?

A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that?

A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it?

A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on July 1st with that questionnaire completed; do you understand that?

A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

(A copy of Grand Jury Exhibit #16, referred to above, is attached hereto and made a part hereof.)

[fol. 10] Thereafter, on January 11, 1965, James T. Stevens, appeared before the said First June, 1964 Grand Jury of the County of New York and the following took place:

James T. Stevens, recalled, further testified as follows:

By Mr. Andreoli:

Q. What is your name?

A. James T. Stevens, S-t-e-v-e-n-s.

Q. Where do you live?

A. 164 Engert Avenue, E-n-g-e-r-t, Brooklyn.

Q. And you are a former police lieutenant in the New York City Police Department; is that correct?

A. That's right.

Q. Mr. Stevens, you have appeared before this grand jury on prior occasions?

A. I have.

Q. Is that correct?

A. I have.

Q. And on a prior occasion you were sworn to tell the truth; is that correct?

A. That's right.

Q. And on that occasion, when you appeared before this grand jury, you were told the nature of the inquiry before this grand jury; is that correct?

A. At this time, Mr. Andreoli, I would like to read into the record a statement, if you please.

Mr. Andreoli: May we have the record show the witness has removed from his pocket a card with some typewriting on it, from which he is now reading.

[fol. 11] The Witness: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights

under the fifth and fourteenth amendments of the United States Constitution; and further, that my attorney has advised me my rights under the fifth, sixth and fourteenth amendments of the U. S. Constitution have been violated and they, my attorneys, have presently this case pending before the Court of Appeals of the State of New York.

By Mr. Andreoli:

Q. Now, you say "this case pending." What case do you refer to, Mr. Stevens?

A. The matter of my signing a waiver before this—

Q. What case is pending before the Court of Appeals of the State of New York?

A. The matter of my signing a waiver before this particular grand jury.

Q. You understand, Mr. Stevens, and I believe you have discussed this with your attorney, that you have been held in contempt on two prior occasions; is that correct?

A. That's correct.

Q. Once before the Honorable Justice Marks of the Supreme Court, State of New York; is that correct?

A. That's correct.

Q. And that that matter was taken to the Appellate Division; is that correct?

A. That's correct.

Q. And that subsequent to that, on a second occasion, you appeared before Judge Schweitzer and you were again held in contempt; is that correct?

A. That's correct.

Q. Now, the matters with—in each case you were sentenced; is that correct?

A. That's correct.

[fol. 12] Q. Sentenced to thirty days and an additional thirty days in the event you failed to pay a fine of \$250; is that correct?

A. That's correct.

Q. And those sentences have been served; is that correct?

A. That's true.

Q. And the fines have been paid; is that correct?

A. That's right.

Q. And now when you say "this matter is pending before the Court of Appeals," you are referring then to those matters, I assume?

A. No. To the original thirty-day commitment by Judge Marks, as far as I understand it. I am not a lawyer.

Q. When you say "this case," that is what you mean?

A. Yes, sir.

Q. All right, sir. Fine. We are now before the grand jury, you are here before the same grand jury where you were sworn to tell the truth. Now, I show you Grand Jury Exhibit 16 and ask you whether or not the signature appearing on that paper is yours?

A. That is my signature, but it wasn't executed in the Grand Jury; it was executed outside the grand jury prior to my appearing in this grand jury.

Q. And it was signed by you in the presence of Janet D. Winston?

A. That's right.

Q. And Jerome P. Craig; is that correct?

A. That's right.

Q. All right. Now, when you first appeared before the grand jury it was explained to you that this grand jury was inquiring into the crimes of conspiracy to commit the crime of bribery, namely, bribery of police officers and bribery of police officers, in matters pertaining to the suppression of gambling; is that correct?

A. That's correct.

[fol. 13] Q. It was also explained to you—were you also asked asked, "Do you understand further that you have been called as a potential defendant and not as

a witness? Do you understand that?" Was that question asked of you before the grand jury at that time?

A. When I signed the waiver outside the grand jury—

Q. The question is—

A. Beg pardon?

Q. The question is, did you at that time answer to the question, "Do you understand further that you have been called here as a potential defendant and not as a witness? Do you understand that?" and did you answer, "I do?"

A. Well, I would like to elaborate on that question, if I may.

Q. Did you answer that question at that time?

A. I did.

Q. Had that also been explained to you—withdrawn. Was it also explained to you that under the New York State Constitution and—withdrawn. Was it explained to you that under the Constitution of the United States you had a right to refuse to answer any questions that might tend to incriminate you? Was that explained to you?

A. Not outside prior to my signing the waiver of immunity.

Q. I am asking you about in the grand jury, not what you claim happened outside. Before the grand jury was that explained to you?

A. That was.

Q. And before the grand jury was it explained to you that under the New York State Constitution and the New York City Charter a person who desires to continue in public office is required to sign a limited waiver of immunity? Was that explained to you before the grand jury?

A. I don't—I don't recall that. It was explained outside that I was being called as a witness and that if I didn't sign the waiver of immunity—

[fol. 14] Q. Do you now tell this grand jury that you do not recall having the New York City Charter and the Constitution of the State of New York—

A. I remember you mentioning the Constitution.

Q. Did you say before this grand jury that you understood that if you failed to sign a limited waiver of immunity that you could lose your job? That was not explained to you before this very body?

A. I believe it was.

Q. Is there any doubt in your mind?

A. No.

Q. And was it further told to you that it meant that if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you gave could be and will be used against you? Was that explained to you?

A. I believe it was, yes, sir.

Q. And did you tell this grand jury you understood that?

A. That's right.

Q. And at that time, after those things were explained to you, you were asked, "Are you prepared to sign a waiver of immunity? Answer: I am." Is that correct? Is that what transpired?

A. I—well, at this point I would like to put on the record what is said and what actually happens may appear to someone who later reads this—

Q. The fact of the matter, the waiver was signed outside after it was explained to you outside?

A. That's right.

Q. Then you were asked these questions in the grand jury repeating what had happened before?

A. That's correct.

[fol. 15] Q. And you were asked if you were still ready to sign a waiver of immunity; isn't that correct?

A. It's months back now. I can't remember word for word, Mr. Andreoli. I would only be kidding myself, I would be kidding my—

Q. Were you asked this question before the grand jury, just so the record is complete in this single proceeding; the question being:

"When you signed this," referring to Grand Jury Exhibit 16, which you just identified, "did you understand that this was a waiver of immunity as I just described to you?"

"Answer: I did, sir."

Were you asked that and did you give that answer?

A. I believe so, yes, sir.

Q. And did you understand the import of it? Did you say you did?

A. At that time I did not.

Q. Did you say you did?

A. Well, I at that time—

Q. All right. Now, you understand now that you are appearing before this grand jury, therefore, that you are now under oath, that the inquiry does pertain to conspiracy to commit the crime of bribery of public officers, namely, police officers, in matters pertaining to the suppression of gambling; do you understand that?

A. Yes, sir.

Q. You do. And do you understand further that you have appeared before Judge Schweitzer and the question as to whether or not you were required to answer questions was argued; is that correct?

A. That's correct.

Q. And you understand that you were directed to answer on several prior occasions; is that correct?

A. That's correct.

[fol. 16] Q. All right. Now, so there will be no misunderstanding, you understand further that you are a potential defendant; you understand that?

A. Well, you explained it to me, yes, sir.

Q. And do you understand further that regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity? Do you understand that?

A. Yes, sir.

Q. Now, is there anything that you have been asked so far that you do not understand, Mr. Stevens?

A. I wouldn't know how to answer that.

Q. Well, is there any questions in your mind that you wish to discuss with counsel before I proceed to the next question?

A. Yes, I would, if I may.

Mr. Andreoli: All right. May we give this witness a moment to consult with counsel?

The Witness: Thank you.

(Witness leaves grand jury room at 2:58 p.m. and returns at 3:02 p.m.)

By Mr. Andreoli:

Q. Now, Mr. Stevens, you have conferred with counsel?

A. That's right, sir.

Q. What is the name of the attorney who is outside the grand jury room?

A. Mr. John Schofield, S-e-h-o-f-i-e-l-d.

Q. And he has been representing you for some time now; is that correct?

A. That's right.

[fol. 17] Q. Now, Mr. Stevens, during the last five years, while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York?

A. I refuse to answer that question, Mr. Andreoli, on my rights under the fifty, sixth and fourteenth amendments of the Constitution.

Mr. Andreoli: All right. Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer, who is now the presiding justice there.

Foreman: So directed.

(The witness, foreman, Mr. Andreoli, Mr. McGuire and the reporter leave the grand jury room.)

And the Court, on the said day, after hearing argument by John Schofield, Esq. of Maloney & Schofield, counsel for the said James T. Stevens, and the District Attorney, by Peter D. Andreoli, Esq., Assistant District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following sets forth the pertinent parts of a proceeding which took place in Part 30 of the Supreme Court of the County of New York on January 11, 1965:

[fol. 18] Mr. Andreoli: If Your Honor pleases, continuing with the First June 1964 Grand Jury, Mr. George Lyons, Foreman, is present in court. Mr. James T. Stevens, witness before that Grand Jury, is in court with his counsel Mr. John Schofield.

If Your Honor pleases, this grand jury, as Your Honor knows, has been inquiring into the crimes of conspiracy to commit the crime of bribery of public officials; in this instance, police officers in matters dealing with the suppression of gambling.

This witness, Lieutenant—former Lieutenant James T. Stevens appeared before this grand jury on June 26, 1964. At that time he was a police officer of the Police Department of the City of New York. He was

advised of his right—constitutional right, and so forth, and at that time signed a waiver of immunity and testified before that grand jury.

I therefore offer first in evidence the—deemed marked—the grand jury testimony of James T. Stevens for the date June 26, 1964, at which time, as I see, he was sworn, signed a limited waiver of immunity after he was advised that he was a potential defendant in that investigation.

I also ask to have deemed marked Grand Jury Exhibit 16 which is the limited waiver of immunity signed by Stevens at that time.

The Court: Mark it—deemed marked.

(Whereupon, grand jury testimony of James T. Stevens for the date June 26, 1964, was deemed marked People's Exhibit 1 in evidence, as of this date.)

(Whereupon, Grand Jury Exhibit 16, limited waiver of immunity signed by James T. Stevens, was deemed marked People's Exhibit 2 in evidence, as of this date.)

Mr. Andreoli: Now, this is indicating an application on behalf of this grand jury for a direction to James T. Stevens that he answer following questions. He appeared before this grand jury this afternoon, at which time he was again advised of his rights and he was further questioned or, at least, questions were put to him. And he was asked the following question—and may I call the grand jury reporter so that that may be accurately stated.

Will you take the stand.

(Whereupon, Mr. Felixbrod took the witness stand.)

[fol. 19] Mr. Andreoli: What is your name—will you swear him?

The Court: The Clerk will swear the witness.

George Felixbrod, called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination.

By Mr. Andreoli:

Q. Where do you live?

A. 1407 Sheridan Avenue, Bronx.

Q. And are you a grand jury stenographer, County of New York?

A. I am.

Q. And were you assigned to the First June 1964 Grand Jury this afternoon?

A. I was.

Q. And during the course of the proceedings before that grand jury, did the person now appearing before the Court James T. Stevens appear before that grand jury?

A. He did.

Q. And at that time was he advised that he had been previously sworn before that grand jury?

A. Yes.

Q. And he was advised of his rights, so forth; is that correct?

A. That is correct.

Q. Now, at some point was a question put to the witness concerning his participation in possible conspiracy?

A. Correct.

Q. And do you have the question that was asked of the witness?

A. I do.

[fol. 20] Q. Will you read that question, please.

A. "Question: Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive

any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York?"

Q. What answer did the witness give, if any?

A. "Answer: I refuse to answer that question, Mr. Andreoli, on my rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution.

"Question: All right.

"Mr. Andreoli: Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer who is now the presiding Justice there.

"The Foreman: So directed.

Mr. Andreoli: If Your Honor pleases, upon behalf of the First June 1964 Grand Jury, I request the Court direct this witness to answer the question which he refused to answer before the grand jury, that question being material and relevant and very important to the inquiry now pending there.

The Court: Well, I first make the affirmative finding of law and fact that the question posed of the witness is a legal—constitutes a legal and proper interrogatory within the purview of the appropriate sections of the—Judiciary Law I believe is Section 750 of the Judiciary Law, Subdivision 5. And I will make the direction that he return to the grand jury and answer that question.

Now, I would like to have you, Mr. Schofield, confer with your client to determine whether or not he is prepared to comply with the Court's direction because if this is just a futile statement on my part, then I can make a determination.

The Court: Will you read back the question, Mr. Stenographer, which was asked of the witness and

which he refused to answer before the grand jury.

[fol. 21] The Witness: "Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operation in violation of the Penal Law of the State of New York?"

The Court: Do you want to repeat your application?

Mr. Andreoli: Now, may we have the witness directed to answer the question, Your Honor.

The Court: Now, having heard the question, the Court now directs you to answer the question, Mr. Stevens.

Mr. Andreoli: May we inquire whether the witness intend to comply with the Court's direction and answer the question before the grand jury?

Mr. Stevens: May I answer it?

The Court: You may.

Mr. Stevens: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights under the Fifth and Fourteenth Amendments of the U. S. Constitution; and, further, that my attorney has advised me that my rights under the Fifth, Sixth and Fourteenth Amendments of the U. S. Constitution have been violated and he has presently this appeal pending before the Court of Appeals before the State of New York.

Mr. Andreoli: I ask for judgment on behalf of the grand jury.

The Court: The Court now adjudges the witness in contempt pursuant to the pertinent provision of the Judiciary Law and direct that he be confined in the Civil Prison for a period of 30 days and fined the sum

of \$250.00 and on failure of the witness to pay such sum he is to serve an additional 30 days. I will direct the District Attorney to draw the appropriate mandate of the Court embodying the terms of this judgment. And I will direct the witness to appear before this Court on—

* * * * *

[fol. 22] The Court: Friday at 3 o'clock, January 15th.

* * * * *

The witness James T. Stevens having on January 11, 1965, contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

Ordered and Adjudged that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

Ordered and Adjudged that for the said criminal contempt of court, the said James T. Stevens be committed to the custody of the Sheriff of the City of New York at Civil Jail, 434 West 37th Street, City and County of New York for a term of 30 days and said James T. Stevens be directed to pay a fine of \$250 and in default thereof, to serve an additional term of 30 days at Civil Jail.

....., J.S.C.

[fol. 23]

GRAND JURY EXHIBIT No. 16

THE PEOPLE OF THE STATE OF NEW YORK
—against—
JOHN DOE, et al.

WAIVER OF IMMUNITY

I, Lt. James T. Stevens, residing at 164 Engert Ave.—Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964, Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

/s/ JAMES T. STEVENS

WITNESS:

/s/ JEROME P. CRAIG

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and

known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

/s/ JANET D. WINSTON
Janet D. Winston
Notary Public, State of New York
No. 03-4308493
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1966

[fol. 24]

EXHIBIT 2 TO PETITION

At a term of the Supreme Court in and for the County of New York; Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 30 day of July, 1964.

P R E S E N T :

Honorable CHARLES A. MARKS,

Justice.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JAMES T. STEVENS, a witness before the First June, 1964 Grand Jury of the County of New York.

Mandate of Order Adjudging Witness Guilty of Contempt.

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now

actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn and it appearing to the satisfaction of the court that James T. Stevens, on July 22, 1964, after being duly summoned and sworn in the manner prescribed by law as a witness, in a certain matter pending before such Grand Jury whereof they had cognizance, against John Doe et al, for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there refuse to answer legal, proper and relevant questions which [fol. 25] were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

- Q. What is your full name?
- A. With the rank?
- Q. Yes.
- A. Lieutenant James T. Stevens.
- Q. And where are you assigned?
- A. 11th Division, Brooklyn.
- Q. And you are a police officer of New York City Police Department?
- A. I am. I am.
- Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

A. I do.

Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that?

[fol. 26] A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?

A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engerts E-n-g-e-t-s, Avenue Brooklyn?

A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engerts Avenue, Brooklyn —" There appears to be a signature, "James T. Stevens," is that the—your signature?

A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you?

[fol. 27] A. I did, sir.

Q. And you understand the import of it?

A. I do.

Q. And was this signed in the presence of a notary?

A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that?

A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it?

A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on

July 1st with that questionnaire completed; do you understand that?

A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

[fol. 28] Thereafter on July 15, 1964 James T. Stevens appeared before Third of the July 1964 Grand Jury of the County of New York and the following took place:

JAMES STEVENS, Lieutenant, New York City Police Department, appeared as a witness, but was not sworn, stated as follows:

By Mr. Scotti:

Q. Is your name James Stevens?

A. That's correct, sir.

Q. Sit down, please. What is your rank?

A. Lieutenant.

Q. Where are you assigned?

A. Presently?

Q. Yes.

A. 11th Division.

Q. And previously?

A. Manhattan North.

Q. Now, lieutenant, you appeared before the First June 1964 Grand Jury not too long ago, correct?

A. That's correct.

Q. And you signed a waiver of immunity before that grand jury; is that correct?

A. To my understanding it was a partial waiver.

Q. A limited waiver of immunity?

A. Limited, that's correct.

Q. We explained it to you at that time?

A. That's correct, yes.

Q. Now, it becomes necessary for this grand jury to examine you before them in connection with the investigation that's being conducted before this grand jury to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in connection with the enforcement of the gambling laws of the state of New York.

[fol. 29] Are you willing to sign this waiver of immunity known as a limited waiver of immunity, which means that you waive immunity with respect to matters that are related to your official conduct or to the performance of your official duties?

A. I am not.

Q. You refuse to do so?

A. I refuse to do so.

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official duties, you understand that?

A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination?

A. Right, sir.

Q. That you can invoke at any time?

A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer?

A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter?

A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that?

A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and upon his advice, he advised me to withdraw my partial waiver of immunity.

[fol. 30] Q. You mean your limited waiver of immunity?

A. Partial or limited, yes, sir, whichever.

Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury?

A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions?

A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify?

A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't

concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that?

A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the constitution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right?

A. I do. I've been advised by my counsel now.

Q. You refuse to do so?

A. I do so, yes.

Mr. Scotti: You're excused.

Witness: Thank you.

(Witness excused.)

On July 22, 1964 the said James T. Stevens again appeared before the said First of the June, 1964 Grand Jury of the County of New York and the following took place:

[fol. 31] JAMES STEVENS, recalled as a witness, having been previously duly sworn, further testified as follows:

By Mr. Scotti:

Q. Your name is James T. Stevens?

A. That's correct, sir.

Q. Now, you appeared before this grand jury on June 20th of this year, you were sworn and you signed what has been characterized as a limited waiver of immunity which was explained to you at the time; am I correct?

A. At this time I refuse to answer on my State and Federal—my constitutional rights.

Q. Well, if you recall, Mr. Stevens, Mr. Andreoli put to you a number of questions before you were sworn advising you that you were being called as a potential

defendant and not as a witness, and finally asking you, after explaining the nature of the waiver of immunity, whether you were willing to sign this waiver of immunity, and you did sign this waiver of immunity; am I correct?

A. I refuse to answer on the grounds of violation of my constitutional rights.

Q. Well, on that occasion you were directed by the grand jury to fill out a financial questionnaire and return it to this grand jury filled out; am I correct?

A. I refuse to answer on the constitutional rights.

Q. I explained to you last time when you appeared with your attorney before another grand jury that in my opinion you are legally obligated to answer proper questions that relate to the nature of this investigation by virtue of the fact that you waived immunity as required of public officers by the constitution of the State of New York and the City Charter. I explained that to you; am I correct?

A. I refuse to answer on the grounds of—same answer.

Q. Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, [fol. 32] during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you?

A. I refuse to answer on the grounds of State and Federal constitution.

Q. I want to show you this waiver of immunity, Grand Jury Exhibit #16, entitled People of the State of New York against John Doe, et al., waiver of immunity, "I, Lieutenant James T. Stevens," is this the waiver of immunity you signed?

A. I refuse to answer on the grounds—State and Federal constitution.

Mr. Scotti: Mr. Foreman, it now becomes my duty to appear before the court and make an application on behalf of this grand jury for a direction from the court to this witness.

(Mr. Scotti, Mr. Andreoli, the Foreman, the witness, and the stenographer leave the grand jury room.)

And the Court, on the said day, after hearing argument by counsel for the said James T. Stevens, and the District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following proceeding took place in Part 30 of the Supreme Court of the County of New York on July 22, 1964:

[fol. 33]

* * * * *

The Court: Mr. Stevens, I am directing the Court Reporter to read to you the question that was submitted to you and about which you were interrogated by Mr. Scotti before the First June 1964 Grand Jury, which Grand Jury I understand granted you immunity, and I understand that you signed a limited—

Mr. Scotti: No—before which he executed a waiver of immunity.

The Court: I say he executed a limited waiver of immunity, and under the circumstances I direct the Reporter to read the question to you. Go ahead.

Grand Jury Reporter:

“Question by Mr. Scotti:

“Question: Now I am going to ask you point-blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and

concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

"Answer: I refuse to answer on the grounds stated in the State and Federal Constitution."

The Court: Now, Mr. Stevens, having heard the question read to you by the Court Reporter, that is my question to you, and I direct you to answer it. What is your answer?

Mr. Stevens: I stand on my Constitutional rights, your Honor.

The Court: All right. Under the circumstances of your refusal to answer, the Court finds you guilty of criminal contempt of this Court and will pronounce sentence upon you Friday—

Mr. Molony: I would like a week.

The Court: Is there any objection to Tuesday?

Mr. Scotti: Tuesday I have no objection.

[fol. 34] The Court: Tuesday, July 28, 1964. And you are to appear in this Court at 11:00 A.M. on July 28th for that purpose.

Mr. Scotti: May I respectfully suggest to the Court that the record show that this witness has refused to comply with the direction? He merely said, "I stand on my Constitutional rights" and has not indicated—

The Court: That is a refusal. Do you refuse to answer the question?

Mr. Stevens: I do, sir, on my Constitutional rights.

The Court: Now, in the interval, counsel—Mr. Molony, is it?

Mr. Molony: Molony.

The Court: If you have any memorandum to submit to me before Tuesday, I will be glad to receive it; and send it to my chambers.

Mr. Molony: Yes, your Honor. May we have argument on Tuesday at 11:00 or just submit a memorandum?

The Court: Well, you come down Tuesday; and after I see the memorandum, perhaps it may need argument. All right.

Mr. Molony: Thank you, your Honor.

Mr. Scotti: Thank you, your Honor.

The court then permitted counsel for James T. Stevens to submit a memorandum of law on July 28, 1964 and heard reargument by Counsel and the District Attorney.

The witness James T. Stevens having on July 22, 1964 contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

[fol. 35] ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be directed to pay a fine of \$250 and be committed to the custody of the Sheriff of City of New York at Civil Jail, 434 W. 37 St., City, County and State of New York for a term of 30 days, the execution of said order to be stayed for five days from the service of the mandate to permit the witness to apply to the appellate division for a stay.

CHARLES MARKS
J.S.C.

[fol. 36]

EXHIBIT 3 TO PETITION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of October, 1964.

Present—Hon. Charles D. Breitel, Presiding Justice; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Earle C. Bastow, Justices.

7909

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

for an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

vs.

Honorable CHARLES MARKS, Justice of the Supreme Court of the State of New York, Respondent.

The above-named petitioner, James T. Stevens, having presented a petition, verified the 28th day of August, 1964, praying for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 762 of the Judiciary Law, annulling the order of mandate dated July 30, 1964, and remitting the \$250. fine paid by petitioner; and for other relief,

And Hon. Frank S. Hogan, District Attorney, New York County, having filed and served upon the petitioner on the 5th day of October, 1964, a notice of motion, pursuant to Section 7804(f) of the Civil Practice Law and Rules, to dismiss the petition herein as a matter of law; and said

proceeding having duly come on to be heard before this Court on the 6th day of October, 1964.

Now, upon reading and filing the notice of application, dated September 28, 1964, with proof of due service thereof, the petition of James T. Stevens, duly verified the 28th [fol. 37] day of August, 1964, and the affidavit of John P. Schofield, duly sworn to the 6th day of October, 1964, all read in support of the petition, and the notice of motion to dismiss the petition dated October 5, 1964, by Hon. Frank S. Hogan, District Attorney, New York County, with proof of due service thereof, and the affidavit of Michael R. Stack, Assistant District Attorney, duly sworn to on the 5th day of October, 1964, all read in opposition to the application of the petitioner and in support of the motion to dismiss the petition; and after hearing Mr. John P. Schofield in support of the petition and in opposition to the motion to dismiss the petition, and Hon. Frank S. Hogan, District Attorney, New York County, in opposition to the application of the petitioner, and in support of the motion to dismiss the petition; and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the motion of Hon. Frank S. Hogan, District Attorney, New York County, to dismiss the petition as a matter of law, be and the same hereby is granted and the proceeding be and the same hereby is unanimously dismissed, without costs.

Enter:

Clerk

[fol. 38] Brietel, J.P., Valente, Stevens, Eager and Bastow
7909 Matter of Stevens, pet. (Marks, vs.)—Motion to
dismiss petition granted and proceeding unanimously dis-
missed, without costs. When petitioner, a lieutenant in the
Police Department of the City of New York, first appeared
before the grand jury of New York County which was

investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In *Regan v. New York* (349 v.s. 58), it was clearly held that one circumstanced as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify. Hence, the claimed invalidity of the waiver could be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that (*Regan v. New York*) is controlling here, we do not reach the question as to the effect of *Mallory v. Hogan* (378 U.S. [fol. 39] 1 and *Eseobedo v. Illinois*, 378 U.S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

[fol. 40]

EXHIBIT 4 TO PETITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of JAMES T. STEVENS, Petitioner, for a Writ of Habeas Corpus to inquire into his detention by JOHN J. McCLOSKEY, Sheriff of New York City.

Before:

HON. WILLIAM B. HERLANDS,
District Judge.

New York, August 14, 1964;
4.00 o'clock p. m.

APPEARANCES:

MOLONY & SCHOFIELD, Esq.,
Attorneys for Petitioner,
137 South Main Street,
New City, Rockland County, N.Y.;

John P. Schofield, Esq., and
Girard E. Molony, Esq., of Counsel.

MICHAEL S. HOGAN, Esq.,
District Attorney, New York County;

Girard D. McGuire, Esq.,
Assistant District Attorney,
of Counsel.

[fol. 41]

MEMORANDUM OPINION—August 14, 1964

The Court: On June 26, 1964, the petitioner executed a limited waiver of immunity before the New York County

grand jury, in accordance with the provisions of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter.

On July 15, 1964, he refused to testify before a grand jury, asserting that he wished to withdraw the waiver.

On July 22, 1964, when again subpoenaed before a grand jury, he renewed his request to withdraw the waiver of immunity; and he refused to answer any questions before the grand jury.

On the same day, he was brought before Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who asked the petitioner the following question:

"Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law [fol. 42] of the State of New York? Did you?"

The petitioner refused to answer the question on the asserted grounds that his State and Federal constitutional rights privileged him to remain silent.

Petitioner was adjudged guilty of criminal contempt by Mr. Justice Marks on July 30, 1964. He was sentenced to serve a term of thirty days and to pay a fine of \$250. Execution of the mandate of order was stayed for five days to permit an application for a stay to the Appellate Division of the Supreme Court for the First Department.

The Honorable Bernard Botein, Presiding Justice of the Appellate Division, denied the application for the stay but granted an order allowing the petitioner to have oral argument of his appeal on September 9, 1964.

The petitioner commenced serving the term on August 5, 1964. This term will expire on September 4, 1964. He is presently confined in the New York Civil Jail.

On August 5, 1964, a writ of habeas corpus was allowed [fol. 43] by this Court and made returnable on August 10, 1964, at which time the matter was argued.

This petition for a writ of habeas corpus is hereby denied for three interrelated reasons.

I.

An Article 78 proceeding in the nature of an appeal (N.Y.C.P.L.R. Section 7801) is now pending before the Appellate Division of the New York State Supreme Court for the First Department. That proceeding has been set down for argument on September 9, 1964. Therefore, this State remedy has not been exhausted.

See e.g., *Shelton v. State*, 285 F. 2d 540 (4th Cir. 1961); *People v. Nenna*, 214 F. Supp. 102 (S.D.N.Y. 1963); *People ex rel Cuomo v. Fay*, 149 F. Supp. 352 (S.D.N.Y. 1956); *People ex rel Milo v. Jackson*, 148 F. Supp. 757 (S.D.N.Y. 1957).

This Court considers the petitioner's claim that he has exhausted available State remedies to be of doubtful validity. That doubt is resolved in favor of a procedure that affords the State Courts an opportunity to determine the substantive questions of constitutionality raised by the petitioner. See *Darr v. Burford*, 339 U. S. 200, 204 (1950); *U. S. v. La Vallee*, 306 F. 2d 199, 202 (2 Cir. 1962).

II.

In extraordinary circumstances, the Federal Court may dispense with rigid compliance with the general requirement that State remedies be exhausted before invoking federal habeas corpus. *Frisbie v. Collins*, 342 U. S. 519 (1952).

This requires an evaluation of the particular facts and circumstances on a case by case basis. See *Frisbie v. Collins*, 342 U. S. 519, 521, (1952).

There is nothing extraordinary about the present situation. On the contrary, this appears to be a garden variety contempt case, where a municipal employee refuses to answer material questions before a county grand jury after having signed a limited waiver of immunity. The grant

[fol. 45] or refusal of a stay of execution of a criminal contempt sentence is an ordinary exercise of judicial judgment by the State Courts. This is routine litigation.

III.

A frank and realistic appraisal of the present proceedings clearly indicates that the novel and far-ranging constitutional issues posed by the petitioner would require extensive research and mature deliberation. The practicalities of judicial administration, therefore, pointedly suggest that, by the time such a decision on the substantive constitutional issues were rendered, the same questions could probably be determined by the New York appellate courts.

The United States Supreme Court has repeatedly emphasized the necessity for a circumspect approach in dealing with sensitive matters of federalism, that is, Federal-state court jurisdiction. See *Darr v. Burford*, 339 U. S. 200, 204 (1950); *Fay v. Noia*, 372 U. S. 391, 419-20 (1963).

Were this Court to rush in and summarily adjudicate [fol. 46] issues that will come before the Appellate Division of the State Supreme Court in less than a month, such procedure might take on the undesirable aspect of a judicial race.

These desiderata persuasively indicate that this Court, in the exercise of its discretion, should decline to grant the writ. See *U. S. ex rel. Kennedy v. Tyler*, 269 U. S. 13 (1925).

The petition for the writ of habeas corpus is denied. So ordered.

U. S. D. J.

[fol. 47]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I will endorse the writ as satisfied.

Mr. Molony: May we have permission to go to the Court of Appeals, Your Honor?

The Court: If my permission is necessary.

Mr. Molony: We have to get permission from you or a Judge of the Court of Appeals, Your Honor. If you feel there is a constitutional question, we prefer getting permission from you.

The Court: If you need my permission I will grant the permission.

Mr. Molony: Thank you, Your Honor.

The Court: It is noted on the record. I don't know that you do, but if you do it is on the record.

Mr. Molony: Thank you, Your Honor.

[fol. 106]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

65 Civil 400

UNITED STATES OF AMERICA *ex rel.* JAMES T. STEVENS,
Petitioner,
—against—

JOHN J. McCLOSKEY, for a Writ of Habeas Corpus to
Inquire Into His Detention by the Sheriff of New York
City.

APPEARANCES:

Molony & Schofield, Esqs., 137 South Main Street, New City, Rockland County, New York, Attorneys for Petitioner, Gerard E. Molony, Esq., John P. Schofield, Esq., Of Counsel.

Frank S. Hogan, Esq., District Attorney, New York County, 155 Leonard Street, New York, New York, Attorney for Respondent, Michael R. Stack, Esq., Assistant District Attorney, Of Counsel.

[fol. 107]

OPINION—March 17, 1965

EDWARD WEINFELD, D. J.

The petitioner, until recently a lieutenant with the New York City Police Department, is in custody upon a third state court judgment of conviction for contempt,¹ arising out of his refusal to answer a question put to him by a grand jury investigating alleged police corruption. He seeks his release by Federal writ of habeas corpus on the ground that his rights under the Fifth and Sixth Amendments were violated when, given the choice under New York law either of executing a limited waiver of immunity or losing his job,² he signed the waiver. He did not then have the [fol. 108] benefit of counsel. Having previously been twice convicted for failing to answer the same question, he also advances a further contention that his present imprisonment constitutes double jeopardy.

On June 25, 1964, petitioner was served with a subpoena commanding his appearance before a June grand jury of the Supreme Court, New York County. Before entering the jury room, he was advised by an assistant district attorney that, pursuant to state law, unless he signed a waiver of immunity he would forfeit his job. He signed the waiver,

¹ To prevent expiration of petitioner's sentence pending decision, this Court issued a writ pursuant to which he was brought into Federal custody and, in the absence of opposition from respondent, released on his own recognizance. See *Johnston v. Marsh*, 227 F.2d 528, 530 n.4 (3d Cir. 1955).

² N.Y. Const. art. 1, §6 provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision is contained in N.Y.C. Charter §1123.

whereupon he was brought before the grand jury, informed that he was a potential defendant and advised of his right against self incrimination and of state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity. He then acknowledged [fol. 109] he had executed the waiver and understood its effect. Petitioner was sworn, asked his name and similar preliminary questions, and then given a financial questionnaire to complete and return. His next appearance was before a July grand jury, when, represented by counsel, he declined to sign another waiver and asked to withdraw the earlier waiver on the ground that he had not had time to confer with counsel prior to its execution. The following day he was discharged from the Police Department because of his refusal to sign a new waiver before the July grand jury. He was then summoned to reappear before the June grand jury (the one before which he had signed a waiver) and refused to answer any questions, including one with respect to alleged payments from bookmakers and policy operators. Upon reiteration of his refusal to answer before a Justice of the State Supreme Court, he was adjudged in contempt, sentenced to serve thirty days, and fined \$250. Pending an appeal to the Appellate Division, he sought a [fol. 110] stay of the sentence, which was denied.³ When the Appellate Division affirmed his conviction⁴ and leave to appeal to the Court of Appeals had been denied, he had already served his sentence and paid the fine.

Upon expiration of his first contempt conviction, on September 28, 1964 he was again called before the June grand jury and again refused to answer the question asked of him in July, whereupon he was held in contempt and sen-

³ Following this denial he applied for a writ of habeas corpus in this Court, which Judge Herlands denied for failure to exhaust available state remedies, which disposition was affirmed by our Court of Appeals.

⁴ Stevens v. Marks, 22 App. Div. 2d 683, 253 N.Y.S.2d 401 (1st Dep't 1964).

tenced to another term of thirty days and fined \$250.⁵ His third refusal to answer the question before the June grand jury resulted, on January 15, 1965, in his third summary [fol. 111] conviction and imposition of a similar sentence.

It is the State's contention that section 2254 of Title 28, United States Code, requires dismissal of this application on the ground that petitioner has failed, with respect to this third conviction, to exhaust presently available state remedies by an Article 78 proceeding, although it recognizes that his unsuccessful state court test of the first conviction raised the same self-incrimination and right to counsel questions here pressed. This Court is of the view that the exhaustion doctrine does not require petitioner to go through the formality of a futile, time-consuming appeal each time he is adjudged in contempt for failure to answer the same question. Indeed, section 2254 expressly excuses resort to the state courts where, as here, there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." To require repeated and fruitless applications for state court relief would not only confine him to a revolving door process leading nowhere, but "invite the reproach that it is the prisoner rather than the [fol. 112] state remedy that is being exhausted."⁶

The State, however, is on firmer ground in advancing the exhaustion doctrine with respect to the petitioner's claim of double jeopardy. It was never presented to the state courts for consideration, presumably in light of a just decided New York Court of Appeals decision rejecting a similar argument.⁷ It was first raised in the petition for

⁵ Prior to surrender on this second conviction, petitioner sought to remove the proceeding to the Federal court for this district, pursuant to 28 U.S.C. §1443. Judge MacMahon dismissed the petition on October 20, 1964.

⁶ *United States ex rel. Kling v. LaVallee*, 306 F.2d 199, 203 (2d Cir. 1962) (concurring opinion).

⁷ *Matter of Ushkowitz v. Helfand*, N.Y. Ct. App., Jan. 7, 1965, relying on *Second Add. Grand Jury v. Cirillo*, 12 N.Y.2d 206, 237 N.Y.S.2d 709 (1963). Compare *Yates v. United States*, 355 U.S. 66 (1957); *People v. Riela*, 7 N.Y.2d 571, 200 N.Y.S.2d 43, appeal dismissed and cert. denied, 364 U.S. 474, 915 (1960).

the instant writ, but was neither briefed nor argued. In view of the Court's basis for its disposition of this proceeding, it is unnecessary to consider whether the recent state rulings, which seemingly are dispositive of petitioner's double jeopardy plea, relieve him of applying first to the state court before applying to this Court for relief on that ground.

[fol. 113] A more basic question is presented, although the State does not raise it, by the circumstance that the petitioner still has ample time within which to challenge his first conviction in the United States Supreme Court. The New York Court of Appeals denied leave to appeal on February 4, 1965; thus petitioner has until May 4 to move for direct review,⁸ but he has taken no such step. *Fay v. Noia*⁹ overruled *Darr v. Burford*¹⁰ to the extent that it conditioned Federal habeas corpus relief upon a prior certiorari application to the Supreme Court. But whether a prisoner may now proceed directly in a Federal district court to collaterally attack his state court conviction when a remedy is still available in the Supreme Court, and further, whether in an appropriate case the district courts have discretion to require pursuit of such available Supreme [fol. 114] Court review,¹¹ is less clear.¹² Consistent with the Supreme Court's view that the "needs of comity" are adequately served by the exhaustion of state remedies and by

⁸ U.S. Sup. Ct. R. 11(1).

⁹ 372 U.S. 391, 435 (1963).

¹⁰ 339 U.S. 200 (1950).

¹¹ See *Wade v. Mayo*, 334 U.S. 672, 680-81 (1948), overruled in *Darr v. Burford*, 339 U.S. at 208-210, but arguably resurrected in *Fay v. Noia*, 372 U.S. at 435.

¹² The question is sometimes avoided by the petitioner's waiting ninety days before seeking Federal district court relief. See Appendix, p. 19a, *United States ex rel. Carthan v. Sheriff, City of New York*, 330 F.2d 100 (2d Cir. 1964). Imposition of such a ninety-day waiting period, however, seems contrary to *Fay v. Noia*'s advocacy of "swift and imperative justice on habeas corpus." 372 U.S. at 435.

the availability to the states of eventual review in the Supreme Court of Federal habeas corpus decisions,¹³ and that review by certiorari is more meaningful following compilation of a full and complete record by the lower Federal court, this Court concludes that a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct [fol. 115] review in the Supreme Court is still open to him. However, the prisoner does not have an absolute right to bypass the Supreme Court. The district court, just as it has discretion to deny habeas corpus to a prisoner who has bypassed orderly state procedures,¹⁴ also has discretion to require him to exhaust currently available Supreme Court remedies. And the circumstances of this case justify requiring the petitioner here to seek such review.

First, an appropriate amendment by the New York Court of Appeals of its remittitur would enable petitioner to appeal from the contempt conviction as of right on the ground that a state statute was "drawn in question" and upheld over his Federal constitutional objections.¹⁵ Secondly, failing to secure an adequate amendment to the remittitur to permit such an appeal as of right, petitioner would still be in a position to apply for certiorari; and in [fol. 116] either event, bail could be granted.¹⁶ Thirdly, unlike most such applications,¹⁷ the petitioner's was prepared by counsel and presents an adequate basis for decision. Finally, petitioner's success depends upon recon-

¹³ *Fay v. Noia*, 372 U.S. at 437-38.

¹⁴ *Id.* at 438.

¹⁵ 28 U.S.C. §1257(2). Of course, petitioner must apply for and obtain an amended remittitur indicating consideration and disposition of his Federal contentions. See *Ungar v. Sarafite*, 376 U.S. 575, 582-83 (1964).

¹⁶ 18 U.S.C. §3144; *Hudson v. Parker*, 156 U.S. 277, 284-87 (1895).

¹⁷ See *Brown v. Allen*, 344 U.S. 443, 492-95 (1953) (separate opinion by Frankfurter, J.).

sideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim.

In *Regan v. New York*,¹⁸ a New York City policeman was summoned before a grand jury investigating corruption. He, too, executed a waiver of immunity, then sought to repudiate it on the ground that at the time of its execution he was under economic duress and unclear as to his rights. Regan was convicted of contempt, although by a jury, for refusing to answer questions put to him by the grand jury. The Supreme Court held that, where there was an adequate [fol. 117] immunity statute, Regan had no constitutional right to remain silent, and that his contentions with respect to the waiver were premature. Said the Court:¹⁹

"The waiver of immunity, although it does affect the possibility of subsequent prosecution, does not alter petitioner's underlying obligation to testify. Much of the argument before this Court has been directed at the question of whether the waiver of immunity was valid or invalid, voluntary or coerced, effectual or ineffectual. That question is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired.

* * * * *

"The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify."

Petitioner's attempts to distinguish *Regan* are unpersuasive, the factual differences in the two cases appearing to have no relevance to the ground of decision there. Moreover, the Supreme Court last Term reaffirmed the basic

¹⁸ 349 U.S. 58 (1955).

¹⁹ *Id.* at 62, 64.

premise underlying *Regan*: that valid state immunity legislation [fol. 118] empowers a state to compel testimony which would otherwise be self-incriminating.²⁰ Unless *Regan* is to be overruled, resolution of petitioner's contentions concerning the validity of the waiver must await an attempt to prosecute him on the basis of compelled testimony,²¹ or an adjudication with respect to his employment rights.²² The District Court should not be called upon to divine whether *Regan* remains controlling authority. So long as an avenue to the Supreme Court is open, petitioner in these circumstances ought to avail himself of it.

The writ upon which petitioner was brought into Federal custody is dismissed and petitioner, having been released on his own recognizance pending determination of this proceeding, is directed to surrender to the State within five days.

Dated: New York, N. Y., March 17, 1965

Edward Weinfeld, United States District Judge.
Judge.

[File endorsement omitted]

²⁰ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79, 93-100 (1964). The relevance of *Malloy v. Hogan*, 378 U.S. 1 (1964) is less clear, since the *Regan* court seems to have proceeded on the assumption that the self-incrimination clause did apply.

²¹ See *People v. Guidarelli*, 255 N.Y.S.2d 975 (3d Dep't 1965).

²² There is currently pending in the State Supreme Court petitioner's Article 78 proceeding to review his discharge. The State's answer contains an offer to restore petitioner to his position with back pay, provided he testifies pursuant to the waiver now under attack.

[fol. 123]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed March 23, 1965

Name and Address of Appellant:

James T. Stevens, 164 Engert Avenue, Brooklyn, New York.

Name and Address of Appellant's attorneys:

Molony & Schofield, 137 South Main Street, New City, Rockland County, New York.

Appeal From Denial of Writ of Habeas Corpus

Appellant appeals from the Order of the Honorable Edward Weinfeld, District Judge for the United States District Court for the Southern District of New York, dated March 17, 1965, insofar as the Order denies appellant's petition for a writ of habeas corpus. Appellant is presently confined in the New York City Civil Jail, 434 West 37th Street, New York City, New York, in the custody of John J. McCloskey, Sheriff of New York City.

Permission to appeal pursuant to Title 28, Section 2253, was granted by the Order of the Honorable Edward Weinfeld.

Molony & Schofield, the attorneys for the above named appellant hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgment of the Honorable Edward Weinfeld.

Dated: March 22, 1965

Molony & Schofield, Attorneys for Appellant, James T. Stevens, Office & P. O. Address, 137 South Main Street, New City, Rockland County, New York.

cc:

Hon. Frank S. Hogan, District Attorney, New York Co., Attorney for Respondent, 100 Centre Street, New York, N. Y.

[File endorsement omitted]

[fol. 124]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—March 20, 1965

By order dated March 17, 1965, a motion of a writ of habeas corpus was denied pursuant to Title 28, United States Code Section 2253.

I hereby certify that there is a Probable Cause to have this matter heard by the United States Court of Appeals, Second Circuit.

Dated: March 20, 1965.

Edward Weinfeld, United States District Judge.
Judge.

[fol. 125] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 132]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Hon. J. Joseph, Smith, Circuit Judge.

U. S. ex rel. JAMES T. STEVENS, Relator-Appellant,

v.

JOHN J. McCLOSKEY, Sheriff, Respondent-Appellee.

ORDER GRANTING MOTION TO CONTINUE BAIL, ETC.—

March 24, 1965

A motion having been made herein by counsel for appellant to continue appellant at large on his own recognizance, to set the argument of the appeal for March 29, 1965, and to dispense with printing a brief and filing an appendix,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

Further ordered that argument of the appeal be and it hereby is set for Monday, March 29, 1965.

Further ordered that appellant shall file four typewritten copies of a brief on or before Friday, March 26, 1965, and that appellee shall file four typewritten copies of a brief on or before 10 A.M. March 29, 1965.

Further ordered that appellant be and he hereby is continued at large on his own recognizance pending the hearing and determination of the appeal.

A. Daniel Fusaro, Clerk.

[fol. 132a] [File endorsement omitted]

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 453—September Term, 1964.

Argued March 29, 1965

Docket No. 29595

UNITED STATES OF AMERICA, ex rel. JAMES T. STEVENS,
Petitioner-Appellant,

—v.—

JOHN J. McCLOSKEY, as Sheriff of the City of New York,
New York, Respondent-Appellee.

OPINION—May 11, 1965

Before: Lumbard, Chief Judge, Swan and Kaufman, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Weinfeld, *J.*, dismissing a writ of habeas corpus.

Affirmed.

Gerard E. Molony, of Molony & Schofield, New City, N. Y., for petitioner-appellant.

Michael R. Stack, Assistant District Attorney, New York County (Frank S. Hogan, District Attorney, New York County, on the brief), for respondent-appellee.

[fol. 134] KAUFMAN, Circuit Judge:

The principal issue on this appeal is whether a municipal employee could properly refuse to testify before a state

grand jury by merely asserting that he did not voluntarily waive the immunity from prosecution conferred by state law. Although the validity of the waiver executed by the petitioner, James T. Stevens, has yet to be determined, he has threee been adjudged in criminal contempt for refusing, despite directions from two New York State Supreme Court justices, to answer questions propounded by the grand jury. Claiming that he had exhausted the state remedies available to contest his first contempt conviction, the petitioner applied for a writ of habeas corpus in the United States District Court to challenge the third conviction, which like the first two carries a sentence of thirty days' imprisonment, a \$250 fine and in default of the fine an additional 30-day prison term. The District Court denied relief, alluding to a directly relevant Supreme Court holding, *Regan v. New York*, 349 U. S. 58 (1955), that any contentions respecting the validity of the waiver of immunity are, under such circumstances, premature and do not alter the underlying obligation to testify. We affirm.

The basic facts are undisputed, although seemingly complicated—as the following recitation will indicate—by petitioner's repeated efforts to test, in both the state and federal courts, his duty to testify. Stevens, a lieutenant in the New York City Police Department, was first served with a subpoena the morning of June 25, 1964, commanding his appearance as a witness before the First June 1964 Grand Jury, which was then investigating alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Outside the grand jury room, Stevens, without counsel at the time, was advised by an assistant [fol. 135] district attorney to sign a limited waiver of immunity; otherwise, pursuant to the state constitution and city charter,¹ he would be subject to removal from office.

¹ The New York State Constitution, art. I, sec. 6, provides in part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties,

Stevens executed the waiver and went before the grand jury. There he was informed that he was a potential defendant and advised of his privilege against self-incrimination and the state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity or else suffer disqualification from office for five years. Petitioner then acknowledged that he had already executed the waiver of immunity and understood its effect. He answered a few perfunctory questions, identifying himself by name, address, rank and police command, and was dismissed with instructions to return at a later date with a completed financial questionnaire.

On July 15, having been subpoenaed to appear before the Third July 1964 Grand Jury, Stevens—now represented and advised by counsel—declined to sign a new limited waiver of immunity prior to giving any further testimony before this grand jury. At that time he also sought to withdraw the waiver he had previously signed in connection with his appearance before the First June 1964 Grand Jury, claiming that he had been denied the right to consult with counsel when it was executed. As a consequence of these actions, Stevens received formal notice, the following day, that his employment as a police lieutenant was terminated. [fol. 136] One week later, on July 22, Stevens was summoned to reappear before the First June 1964 Grand Jury. He quickly informed that body of his discharge from the police department since his appearance on June 25 and his attorney's advice that, notwithstanding the waiver he had previously signed, he had a constitutional privilege not to testify unless immunity from prosecution was expressly conferred. He was then asked the following question which he refused to answer on the aforesaid ground:

refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision may be found in New York City Charter §1123.

Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York?

Petitioner thereafter was directed by a judge of the State Supreme Court to answer the question and warned of the consequences if he persisted in invoking his purported federal constitutional privilege not to testify. Stevens remained steadfast in his refusal and was adjudged in criminal contempt.

While a review of this contempt citation was pending in the state courts but after expiration of the 30-day prison sentence,² Stevens was again subpoenaed on September 28, 1964, to reappear for the third time before the same First [fol. 137] June 1964 Grand Jury. Once more the question regarding receipt of payments from gamblers was posed and again petitioner persevered in his refusal to respond. This contumacious conduct led to a second judgment of criminal contempt, imposed by another judge of the State Supreme Court.³

² While serving his 30-day sentence, Stevens applied to the United States District Court for a writ of habeas corpus, claiming that his privilege against self-incrimination and right to counsel had been abridged in the state court proceedings. Judge Herlands denied the petition, noting that an Article 78 proceeding in the nature of an appeal, New York Civil Practice Law and Rules §7801, was then pending before the Appellate Division and, therefore, Stevens had not met the general requirement, 28 U. S. C. §2254, that available state remedies be exhausted before invoking federal habeas corpus.

³ Instead of taking advantage of the five days afforded to apply to the Appellate Division of the State Supreme Court for a stay of execution of the second contempt conviction pending appeal, Stevens sought to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443. Judge MacMahon vacated and dismissed the removal petition, indicating that Stevens could not do by indirection what he could not do directly—test the

During the period when petitioner was serving his second 30-day contempt sentence, the Appellate Division of the Supreme Court dismissed his petition seeking to annul the first judge's adjudication of contempt. *Stevens v. Marks*, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1964). The Court, citing the Supreme Court's decision in *Regan v. New York, supra*, held that Stevens' challenge to the validity or effectiveness of the waiver of immunity, although available as a defense in any subsequent prosecution which might arise from the grand jury probe, was not a sufficient justification for refusing to testify at this preliminary stage in the proceedings.

After Stevens completed serving the second sentence and while his motion for leave to appeal from the Appellate Division's adverse decision was pending before the New York Court of Appeals, he was subpoenaed, on January 15, 1965, to appear for the fourth time before the First June 1964 Grand Jury. He continued to persist in his refusal to testify, both before that body and in the face of the judge's new direction. Accordingly, Stevens was ad-[fol. 138] judged guilty of criminal contempt for the third time and once more sentenced to 30 days' imprisonment, a \$250 fine and in default thereof an additional prison term of 30 days. When the New York Court of Appeals subsequently denied leave to appeal from the judgment dismissing the petition to set aside the first adjudication of contempt,* Stevens—who was then in civil prison—filed his present petition for a writ of habeas corpus. Judge Wein-

validity of his waiver of immunity in advance. He noted, moreover, that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right.

* An Article 78 proceeding by which Stevens seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal, is currently pending in the state courts. The Corporation Counsel's answer includes an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged.

feld denied federal relief, but thereafter issued a certificate of probable cause and released petitioner on his own recognizance pending this expedited appeal.

I.

Initially, we note that by testing his first conviction in the state courts—raising basically the same issues now presented⁵—Stevens satisfied the predicate for federal habeas corpus review of his third conviction. The requirement that presently available state remedies with respect to the third conviction be exhausted does not apply where, as here, “circumstances [render] such process ineffective to protect the rights of the prisoner.” 28 U. S. C. §2254. To require a needless, purely formal application for state court relief [fol. 139] each time Stevens is adjudged in contempt for not answering the identical question would, as the District Court noted, “not only confine [petitioner] to a revolving door process leading nowhere, but ‘invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.’”

The District Court did, however, in the exercise of its discretion, deny relief because at that time Stevens could still seek Supreme Court review, by direct appeal or certiorari, of the first conviction. It is not necessary for us to pass on the propriety of that ground for decision. On the last day possible Stevens successfully applied to Circuit Justice Harlan for an extension of time in which to file a petition for a writ of certiorari. But since this appeal has not been withdrawn and our resolution of the Constitu-

⁵ Stevens does claim, for the first time in this petition, that the third conviction subjects him to double jeopardy. But this contention was neither briefed nor argued here and, more important, never presented to the state courts for consideration. Insofar as the present petition is based on this claim, we hold that it is premature for failure to exhaust presently available state remedies. 28 U.S.C. §2254; *United States ex rel. Tangredi v. Wallack*, ____ F. 2d ____ (2 Cir. April 1, 1965); *United States ex rel. Bagley v. LaVallee*, 332 F. 2d 890, 892 (2 Cir. 1964).

tional issues might be of some assistance to the Supreme Court, to which these same issues will be presented in the certiorari application on the first conviction, we deem it appropriate to turn to the merits, a procedure dictated by sound considerations of judicial administration and the course of state litigation on the original conviction, which is in no way antithetical to the needs of comity in our delicately balanced federal system.

II.

The basic and crucial attack by Stevens on all the contempt convictions is grounded on his contention that he could not constitutionally be obligated to testify before a grand jury without an express grant of immunity from prosecution. He brushes aside the effect of the limited waiver of immunity, claiming that his privilege against self-incrimination and right to counsel were infringed when, under the compulsion of New York law and without the [fol. 140] benefit of proper legal advice, he executed the waiver in order to save his job.

But these contentions are, if we are to harmonize our holding with *Regan v. New York, supra*, prematurely advanced and cannot excuse Stevens' contumacious refusal, after repeated judicial directions, to cooperate with the grand jury. The facts of *Regan*—not significantly distinguishable from the instant case—deserve brief mention. *Regan*, also a member of the New York City Police Department, was summoned before a grand jury investigating the alleged association of municipal policemen with criminals, racketeers, and gamblers. At first, he too executed a waiver of immunity, but later—after his employment with the police department had been severed—reconsidered his original waiver and refused to answer the grand jury's questions, claiming that the waiver was obtained by a "pattern of duress and lack of understanding." The Supreme Court upheld his conviction for criminal contempt, noting that the validity *vel non* of the waiver was "irrelevant" because,

given a valid state immunity statute, there was no possible justification for not testifying.

That holding—its force unimpaired by intervening decisions—is dispositive of Stevens' claims. Justice Reed's exposition of the decision's rationale is significant: "The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify." 349 U. S. at 64. Indeed, if Stevens' waiver is defective because he should have had the advice of counsel before signing the instrument, or his federal constitutional rights were abridged by the state requirement that he sign a waiver to preserve his public office, or if he should have been permitted to withdraw the waiver, even then, as we view the [fol. 141] relevant provisions of the state penal law, immunity from prosecution will automatically follow.⁶

The question before us is, therefore, a narrow one: Should a witness be permitted to test the validity of a waiver of immunity prior to testifying before the grand jury? We hold that the resolution of any challenge to the

⁶ The New York Penal Law, §381(2) provides: "In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Section 2447(1) of the Penal Law provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be inerminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein."

waiver must abide the state's subsequent prosecution on the basis of the allegedly compelled testimony, if in fact that course is ever taken by the state. Although we recognize that the grand jury witness is thus placed in a quandary because he is not sure of the status of his waiver, this incertitude cannot bar the state from obtaining his testimony. "[T]he Constitution does not require," the Supreme Court has told us, "the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction . . . The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan v. New York*, 349 U. S. at 64.

[fol. 142] Furthermore, we do not regard *Regan* as having been weakened, much less *sub silentio* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964), which applied the Fifth Amendment's privilege against self-incrimination to the states via the Fourteenth Amendment due process clause. As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings. Moreover, *Malloy's* relevance is limited; if Stevens is eventually prosecuted, he can, relying on that decision, question the validity of his alleged waiver of the privilege against self-incrimination, urging as he does now that he was compelled to testify or forfeit his public employment by an unconstitutional state law. But see *Slochower v. Board of Higher Education*, 350 U. S. 551, 558 (1956); *Garner v. Board of Public Works*, 341 U. S. 716 (1951); *United States ex rel. Carthan v. Sheriff*, 330 F. 2d 100 (2 Cir.), cert. denied, 379 U. S. 929 (1964). Chief Justice Warren foresaw the availability of the point upon a subsequent prosecution based upon the allegedly compelled testimony, when he wrote, in his separate concurrence in *Regan*, that "substantial federal questions may arise if the petitioner is again called upon to testify concerning bribery on the police force while he was an officer and if he is thereafter denied immunity as to any offenses related to the investigation." 349 U. S. at 65 (emphasis added). We are

not aware that it has ever been held that the privilege conferred by the self-incrimination clause of the Constitution creates an absolute right to remain silent under all circumstances in the face of a valid inquiry into official misconduct; rather, it is a shield which protects a witness from being compelled to give testimony which could be used against him in a criminal proceeding flowing from the grand jury testimony. See *Feldman v. United States*, 322 U. S. 487, 499 (1943).

[fol. 143] Finally, we note that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964). Because New York's immunity statute is adequate on its face, we do not believe that Stevens had any constitutional right to refuse to testify before the grand jury. His contempt convictions, therefore, were proper.

Affirmed.

[fol. 144]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel.
JAMES T. STEVENS, Relator-Appellant,

v.

JOHN J. McCLOSKEY,
Sheriff of New York City, Respondent-Appellee.

JUDGMENT—May 11, 1965

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 144a] [File endorsement omitted]

[fol. 145] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 152]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge; Hon. Thomas W. Swan, Hon. Irving R. Kaufman, Circuit Judges.

U. S. ex rel. JAMES T. STEVENS, Relator-Appellant,

v.

JOHN J. McCLOSKEY,
Sheriff of New York City, Respondent-Appellee.

ORDER STAYING MANDATE—June 11, 1965

A motion having been made herein by counsel for the appellant to stay the issuance of the mandate pending a petition for writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(e) of the rules of this court.

A. Daniel Fusaro, Clerk.

[fol. 153]

SUPREME COURT OF THE UNITED STATES

No. 290, October Term, 1965

JAMES T. STEVENS, Petitioner,

v.

JOHN J. McCLOSKEY, Sheriff of New York City.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Question 1 presented by the petition which reads as follows:

“1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refused to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?”

The case is consolidated with No. 210 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

JUN 25 19

JOHN F. DAVIS, C.

IN THE

Supreme Court of the United States

October Term, 1965

No. 290

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention
by JOHN J. McCLOSKEY, Sheriff of New York City.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

GERARD E. MOLONY, Esq.,

MOLONY & SCHOFIELD,

Attorneys for the Petitioner.

No. 137 South Main Street,

City, Rockland County,

New York.

GERARD E. MOLONY,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No.

— o —
JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention
by JOHN J. McCLOSKEY, Sheriff of New York City.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT**

To the Honorable, The Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals, Second Circuit, dated May 11, 1965 (A. p. 62) which order affirmed the order of the United States District Court for the Southern District of New York dated March 17, 1965 which order dismissed a petition for a writ of habeas corpus.

Opinions Below

The opinion of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York is reported in 22 App. Div. 2d 683, 253 N. Y. S. 2d

401 (A. pp. 35-36). There were no other opinions in the State courts.

After being held in contempt a third time petitioner moved for a writ of habeas corpus in the United States District Court for the Southern District of New York. The opinion of the District Court is reported in 239 F. Supp. 419 (A. pp. 37-44). An appeal was taken to the United States Court of Appeals for the Second Circuit. The opinion has not yet been officially reported (A. pp. 49-58).

A previous petition for a writ of habeas corpus had been filed in the United States District Court for the Southern District of New York following the first conviction of contempt. The opinion is officially reported in 234 F. Supp. 25 (A. pp. 45-48).

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was made and entered on May 11, 1965. A further order of the United States Court of Appeals for the Second Circuit was made and entered on June 11, 1965 (R. 63) which continues the Petitioner-Appellant free in his own recognizance pending a determination by the United States Supreme Court as to the granting of certiorari.

Jurisdiction of this Court to review the order of the United States Court of Appeals for the Second Circuit by writ of certiorari is invoked under Title 28 of the United States Code, Section 1254 (1).

Jurisdiction of the United States District Court was based on Title 28 United States Code, Section 2254 in that there is an existence of circumstances which render State process ineffective to protect the rights of the prisoner.

There is a conflict in decisions of the United States Court of Appeals for the Second and Third Circuits.

In *United States of America ex rel Russo v. New Jersey* decided May 20, 1965 No. 14833 and not yet officially reported the Third Circuit released the prisoners because they were not advised that they had a right to counsel at the time of their arrest even though the prisoners did not ask for counsel. The Court below ignored petitioners claim that he was denied the right to counsel in that he wasn't informed by the lawyer representing the people that he had a right to counsel.

In addition, petitioner was deprived of his liberty and livelihood without due process of law, in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. In addition Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter are repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in that all public employees of the State of New York or its political subdivisions who claim a privilege against self-incrimination under the Fourteenth Amendment incur the penalty of forfeiture of their employment and are disqualified from holding any other public employment for a period of five years.

Article 1, Section 6 of the New York State Constitution is contained in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 1, Constitution, pages 67 and 68 of the pocket supplement (A. pp. 58-59).

Section 1123 of the New York City Charter is contained in New York City Charter and Code, Volume 1, Page 307, 1963 edition published by Williams Press, Inc., Albany, New York (A. pp. 59-60).

Questions Presented for Review

1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?
2. Is it a denial of a right to counsel to compel a potential defendant to appear before a grand jury without having the lawyer representing the people advise the potential defendant that he has a right to the advice of counsel?

Statement of the Case

The facts of the case are thoroughly and concisely set forth in the opinion of Judge Weinfeld in the District Court (A. pp. 37-44).

Petitioner is presently free in his own recognizance by order of the United States Court of Appeals for the Second Circuit (A. p. 63).

Petitioner filed a petition with the United States Supreme Court for a writ of certiorari to the Appellate Division, First Judicial Department of the Supreme Court of the State of New York on June 3, 1965. The petition number is 1237 of October Term 1964. The petition of June 3, 1965 involved a first conviction for contempt while the present petition involves a third conviction for contempt.

Reasons for Issuance of the Writ

1. *The waiver signed by petitioner is invalid because it was obtained by coercion and was not a free and voluntary act.*

Under Article 1, Section 6 of the New York State Constitution all public employees of the State and its political subdivisions enjoy second class status if they claim their privilege against self incrimination. Failure to sign a limited waiver of immunity results in the imposition of a penalty for claiming a Constitutional right. The employee loses his position, pension rights and the right to work in public employment for the next five years.

Stevens when called before the grand jury signed a waiver of immunity rather than lose his position after eighteen years of service with only two or more years to go in order to retire on a pension.

Prior to 1938 public employees in New York State were first class citizens under the State Constitution in that they were free to claim their privilege against self incrimination the same as private citizens in the State and the same as all citizens in a Federal proceeding.

At the New York State Constitutional Convention of 1938 the Constitution was amended to provide that any public employee who claimed his privilege would lose his job. This change in the Constitution was held valid by the highest court of New York in the case of *Canteline v. McClellan*, 282 N. Y. 166 (1940). At page 170 the Court stated:

"The people of the State may write such provisions into their Constitution as they see fit, without let or hinderance, subject only to the applicable portions of the Constitution of the United States. As

to immunity from self-incrimination, there is no such applicable provision and such grant could have been omitted in its entirety from the present Constitution of our state. (*Twining v. State of New Jersey*, 211 U. S. 78)."

This was good law until *Twining v. New Jersey* was overruled by *Malloy v. Hogan*, 378 U. S. 1. This was also good law when this Court decided *Regan v. New York*, 349 U. S. 58, which case has been relied on by each of the three courts which have written opinions in this matter. It is submitted that a reconsideration of *Regan v. New York* in light of *Malloy v. Hogan*, will result in *Regan* being overruled.

The dissenting opinion in *Regan* by Mr. Justice Black and concurred in by Mr. Justice Douglas is premised on the contention that the privilege against self-incrimination applies to the States through the Fourteenth Amendment. Since this is now the law *Regan v. New York* should be overruled so that public employees will know that Constitutional protection does extend to them. This would be in accord with previous holdings by this Court in *Wieman v. Updegraff*, 344 U. S. 183; *Ullman v. United States*, 350 U. S. 422; *Slochower v. Board of Education*, 350 U. S. 551; *Torasco v. Watkins*, 367 U. S. 488. In *Orloff v. Willoughby*, 345 U. S. 83, 91, the Court stated:

"It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertions by communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so."

In *Steinberg v. United States*, 163 F. Supp. 590 (1958) the Court of Claims declared unconstitutional a statute which required a retired government employee to testify before a federal grand jury involving his previous government employment or forfeit his retirement annuity. No appeal was taken but this decision was approved by this Court in *Sherbert v. Vernier*, 374 U. S. 398, 404 (1962).

If Stevens has a Constitutional privilege against self-incrimination then his waiver was wrongfully obtained. However Stevens should not have to take the risk of testifying in advance of a decision of this Court as to the validity of the waiver. To require otherwise would deny Stevens the practical protection of the Constitution and only give him a Constitutional right in theory.

2. *Petitioner was denied his Constitutional right to counsel.*

Stevens appeared before the Grand Jury as a compelled witness and as a probable defendant. The investigation had already focused on him. He was confronted by a lawyer representing the people. It is submitted that under these circumstances Stevens should have been advised by the lawyer representing the people that he was entitled to counsel. *Escobedo v. Illinois*, 378 U. S. 478.

This view has been upheld by the State of California in *People v. Dorado*, 42 Cal. Reptr. 169, 178, 398 P. 2d 361, 370 cert. denied May 1965 and in *United States of America ex rel. Russo v. The State of New Jersey* (United States Court of Appeals for the Third Circuit, No. 14833 decided May 20, 1965 and not as yet officially reported).

CONCLUSION

**For the foregoing reasons, it is respectfully submitted
that the Petition for a Writ of Certiorari should be
granted.**

Respectfully submitted,

*GERARD E. MOLONY,
MOLONY & SCHOFIELD,
Attorneys for the Petitioner.*

*GERARD E. MOLONY,
Of Counsel.*

APPENDIX**Petition for Writ of Habeas Corpus**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application
of

JAMES T. STEVENS,

Petitioner,

For a Writ of Habeas Corpus to inquire into his detention
by JOHN J. McCLOSKEY, Sheriff of New York City.

To: The Honorable Judges of the United States District
Court for the Southern District of New York.

1. That he is the applicant above named and is now imprisoned and restrained of his liberty by the Sheriff of the City of New York in the State of New York, County of New York.
2. That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your petitioner is an order of the Honorable Mitchell D. Schweitzer, a Justice of the Supreme Court of the State of New York, in and for the County of New York, made on the 15th day of January, 1965, adjudging petitioner guilty of criminal contempt in which he was sen-

tenced to a term of 30 days and a fine of \$250.00 and in default thereof to serve an additional term of 30 days.

3. Your petitioner has previously served two separate 30-day terms and paid the fine of \$250.00 on each sentence by the same Supreme Court of New York County in which he appeared before the same Grand Jury and was asked the sole and identical question as the one that is now in the Mandate confining him for a third time in the County Jail. The repetition of such question was in violation of Double Jeopardy clause of the Federal Constitution.

4. The Mandate of Order adjudging him guilty of Criminal Contempt dated the 30th day of July, 1964, signed by the Hon. Charles Marks, a Justice of the Supreme Court was affirmed on appeal to the Appellate Division (253 N. Y. 2d 401) of the Supreme Court, First Judicial Department on the 30th day of October, 1964, and thereafter a motion was made to the same Appellate Division for leave to appeal to the Court of Appeals of the State of New York, which leave was denied. A motion was then made directly to the Court of Appeals of the State of New York asking for leave to appeal which motion was denied in a telegram received from the Court of Appeals on the evening of February 4, 1965.

5. Accordingly, your petitioner respectfully submits that all remedies available in the Courts of the State of New York have been exhausted.

6. The underlying facts leading to the issuance of the aforesaid application of criminal contempt of Court are as follows:

7. The First June 1964 Grand Jury of the County of New York commenced an inquiry to determine whether crimes of conspiracy to bribe a Public Officer and bribery of a Public Officer were committed in connection with enforcement of the gambling laws of the State of New York.

8. On the 25th day of June 1964, at 9:30 A.M., the petitioner, then a Lieutenant of the New York City Police Department was given a subpoena as a witness to report immediately to the New York County Grand Jury. A superior officer, Captain Jones, was assigned to take him to the Grand Jury. Outside the Grand Jury Petitioner signed a limited waiver of immunity on the advice of the Assistant District Attorney that he would lose his job if he failed to sign the Waiver. After signing the waiver outside the Grand Jury, the petitioner was brought before the Grand Jury and advised that he was now a possible defendant. No testimony was taken at that time except his identifying himself by name, address, rank and police command; nor was any relevant testimony ever given by him.

9. On his return on July 15, 1964, petitioner now for the first time was represented by counsel and when he was asked to sign a new limited waiver of immunity before the July Grand Jury, he refused. He asked at that time to withdraw the waiver he had signed before the June Grand Jury which he had signed on the advice of the Assistant District Attorney, stating he had been denied the right to counsel when he signed that waiver.

10. On July 16th, he received a letter from the Chief Clerk of the New York City Police Department informing him that his position as a Lieutenant with the New York

City Police Department had been taken away from him because he refused to sign a limited waiver of immunity before the July Grand Jury.

11. An Article 78, which was brought in the New York County Supreme Court (Index No. 16871/64) by the petitioner against Michael J. Murphy, as Police Commissioner, to restore him to the title and position of Lieutenant with full pay and allowances retroactive to the date of dismissal. The Corporation Counsel of the City of New York, appearing as attorney for the Police Commissioner, in answer to the petition, has offered the petitioner his former position with full back-pay from the date of his removal.

12. Thereafter, on July 22, 1964, he was subpoenaed to appear before the original June Grand Jury and on that day he informed the Grand Jury that he had received notice that he was no longer a member of the New York City Police Department and his attorneys advised him that he had the Constitutional right not to testify unless he was given immunity. He was then brought before the Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who knowing that the petitioner had not received immunity, demanded that he answer the question since he had previously signed a limited waiver. The Court and the District Attorney refused to allow him to withdraw this waiver even though he was not represented by counsel and the advice given to him by an Assistant District Attorney, which amounts at most to a coerced waiver. Your petitioner has never been given a hearing to show the surrounding circumstances which lead to his signing the purported waiver on June 25, 1964. The question asked by Hon. Charles Marks on July 22, 1964, is the same

question asked by Hon. Mitchell D. Schweitzer on the 26th day of September, 1964, and again on the 11th day of January, 1965, which has caused your petitioner to be sent to Civil Jail on three occasions. That question is:

"Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?

13. Your petitioner on all three occasions informed the Grand Jury and the Court that he was relying on his attorneys' advice not to answer any questions since no immunity was offered and that he intended to avail himself of the Constitutional guarantees provided by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

14. The District Attorney of the County of New York, under the guise of citing the petitioner for contempt of Court, is in fact using and abusing laws of the State of New York in an attempt to deprive the petitioner of the equal protection of the laws and to deprive him of his rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States. The Courts of the State of New York have failed to accord to Petitioner his Federal Privilege against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution as laid down by the Supreme Court of the United States in its decision of June 15, 1964, in the case of *Malloy v. Hogan* (378 U. S. 1).

14. A previous application for a Writ of Habeas Corpus was made to this Court on the 5th day of August,

1964, when petitioner was imprisoned on the first contempt. The Hon. William B. Herlands in a Memorandum Opinion dated the 14th day of August, 1964, denied the Writ principally because petitioner had not exhausted his State remedies. The Court, however, did recognize the far ranging Constitutional issues posed and stated it would require extensive research and mature deliberation, and thought it undesirable to rush in and summarily adjudicate these issues in a judicial race.

15. Your petitioner has exhausted all his remedies available to him in the State Court on his first Criminal Contempt and the petitioner as a practical matter cannot secure any relief except by this Court granting the Petitioner's writ. The only method by which your petitioner could proceed in the State Court is by an Article 78 proceeding and it would be impossible to secure a review in the State Courts within thirty days hence he is left without any remedy on these series of continuing attempts, except by this writ.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued directed to the Sheriff of the City of New York, State of New York, County of New York, commanding to have the body of petitioner, James T. Stevens, together with the cause of such imprisonment and restraint forthwith before the Court or officer granting said writ.

JAMES T. STEVENS

(Sworn to by James T. Stevens, February 8th, 1965)

**Mandate of Order Adjudging Witness Guilty of
Contempt**

At a term of the Supreme Court in and for
the County of New York, Part 30, thereof,
June 1964 Term, at Criminal Courts Build-
ing, 100 Centre Street, Borough of Manhat-
tan, City and County of New York, on the
15 day of January, 1965.

Present:

HONORABLE MITCHELL D. SCHWEITZER,
Justice.

—0—
THE PEOPLE OF THE STATE OF NEW YORK

—0—
AGAINST

JAMES T. STEVENS, a witness before the First June, 1964
Grand Jury of the County of New York.

—0—
The Grand Jury heretofore in due form of law selected,
drawn, summoned and sworn to serve as Grand Jurors
in the Supreme Court of the County of New York, and
now actually acting as the Grand Jury in and for the
body of the said County of New York, come into court
and make complaint by and through their foreman, there-
tofore duly appointed and sworn, and it appearing to the
satisfaction of the court that James T. Stevens, on Janu-
ary 11, 1965, after being duly summoned and sworn in the
manner prescribed by law as a witness, in a certain mat-

ter pending before such Grand Jury whereof they had cognizance, against John Doe et al, for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there refuse to answer legal, proper and relevant questions which were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

Q. What is your full name? A. With the rank?

Q. Yes. A. Lieutenant James T. Stevens.

Q. And where are you assigned? A. 11th Division, Brooklyn.

Q. And you are a police officer of New York City Police Department? A. I am. I am.

Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that? A. I do.

Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that? A. I do.

Q. Do you understand that under the Constitution of the United States you have the right to

refuse to answer any questions that might tend to incriminate you; do you understand that? A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that? A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that? A. I do.

Q. Are you prepared to sign a waiver of immunity? A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engets E-n-g-e-t-s, Avenue, Brooklyn? A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engets Avenue, Brooklyn—" There appears to be a signa-

ture, "James T. Stevens," is that the—your signature? A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you? A. I did, sir.

Q. And you understand the import of it? A. I do.

Q. And was this signed in the presence of a notary? A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that? A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it? A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand

jury on July 1st with that questionnaire completed; do you understand that? A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.
Any questions?

The Foreman: Should it be marked?

Mr. Andreoli: It is marked.

Thank you.

(Witness excused.)

(A copy of Grand Jury Exhibit #16, referred to above, is attached hereto and made a part hereof.)

Thereafter, on January 11, 1965, James T. Stevens, appeared before the said First June, 1964 Grand Jury of the County of New York and the following took place:

JAMES T. STEVENS, recalled, further testified as follows:

By Mr. Andreoli:

Q. What is your name? A. James T. Stevens,
S-t-e-v-e-n-s.

Q. Where do you live? A. 164 Engert Avenue,
E-n-g-e-r-t, Brooklyn.

Q. And you are a former police lieutenant in the
New York City Police Department; is that correct?
A. That's right.

Q. Mr. Stevens, you have appeared before this
grand jury on prior occasions? A. I have.

Q. Is that correct? A. I have.

Q. And on a prior occasion you were sworn to
tell the truth; is that correct? A. That's right.

Q. And on that occasion, when you appeared before this grand jury, you were told the nature of the inquiry before this grand jury; is that correct?
A. At this time, Mr. Andreoli, I would like to read into the record a statement, if you please.

Mr. Andreoli: May we have the record show the witness has removed from his pocket a card with some typewriting on it, from which he is now reading.

The Witness: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights under the fifth and fourteenth amendments of the United States Constitution; and further, that my attorney has advised me my rights under the fifth, sixth and fourteenth amendments of the U. S. Constitution have been violated and they, my attorneys, have presently this case pending before the Court of Appeals of the State of New York.

By Mr. Andreoli:

Q. Now, you say "this case pending." What case do you refer to, Mr. Stevens? A. The matter of my signing a waiver before this—

Q. What case is pending before the Court of Appeals of the State of New York? A. The matter of my signing a waiver before this particular grand jury.

Q. You understand, Mr. Stevens, and I believe you have discussed this with your attorney, that you have been held in contempt on two prior occasions; is that correct? A. That's correct.

Q. Once before the Honorable Justice Marks of the Supreme Court, State of New York; is that correct? A. That's correct.

Q. And that that matter was taken to the Appellate Division; is that correct? A. That's correct.

Q. And that subsequent to that, on a second occasion, you appeared before Judge Schweitzer and you were again held in contempt; is that correct? A. That's correct.

Q. Now, the matters with—in each case you were sentenced; is that correct? A. That's correct.

Q. Sentenced to thirty days and an additional thirty days in the event you failed to pay a fine of \$250; is that correct? A. That's correct.

Q. And those sentences have been served; is that correct? A. That's true.

Q. And the fines have been paid; is that correct? A. That's right.

Q. And now when you say "this matter is pending before the Court of Appeals," you are referring then to those matters, I assume? A. No. To the original thirty-day commitment by Judge Marks, as far as I understand it. I am not a lawyer.

Q. When you say "this case," that is what you mean? A. Yes, sir.

Q. All right, sir. Fine. We are now before the grand jury, you are here before the same grand jury where you were sworn to tell the truth. Now, I show you Grand Jury Exhibit 16 and ask you whether or not the signature appearing on that paper is yours? A. That is my signature, but it wasn't executed in the Grand Jury; it was executed outside the grand jury prior to my appearing in this grand jury.

Q. And it was signed by you in the presence of Janet D. Winston? A. That's right.

Q. And Jerome P. Craig; is that correct? A. That's right.

Q. All right. Now, when you first appeared before the grand jury it was explained to you that this grand jury was inquiring into the crimes of conspiracy to commit the crime of bribery, namely bribery of police officers and bribery of police officers, in matters pertaining to the suppression of gambling; is that correct? A. That's correct.

Q. It was also explained to you—were you also asked, "Do you understand further that you have been called as a potential defendant and not as a witness? Do you understand that?" Was that question asked of you before the grand jury at that time? A. When I signed the waiver outside the grand jury—

Q. The question is— A. Beg pardon?

Q. The question is, did you at that time answer to the question, "Do you understand further that you have been called here as a potential defendant and not as a witness? Do you understand that?" and did you answer, "I do!" A. Well, I would like to elaborate on that question, if I may.

Q. Did you answer that question at that time? A. I did.

Q. Had that also been explained to you—withdrewn. Was it also explained to you that under the New York State Constitution and—withdrawn. Was it explained to you that under the Constitution of the United States you had a right to refuse to answer any questions that might tend to incriminate you? Was that explained to you? A. Not outside prior to my signing the waiver of immunity.

Q. I am asking you about in the grand jury, not what you claim happened outside. Before the grand jury was that explained to you? A. That was.

Q. And before the grand jury was it explained to you that under the New York State Constitution and the New York City Charter a person who desires to continue in public office is required to sign a limited waiver of immunity? Was that explained to you before the grand jury? A. I don't—I don't recall that. It was explained outside that I was being called as a witness and that if I didn't sign the waiver of immunity—

Q. Do you now tell this grand jury that you do not recall having the New York City Charter and the Constitution of the State of New York— A. I remember you mentioning the Constitution.

Q. Did you say before this grand jury that you understood that if you failed to sign a limited waiver of immunity that you could lose your job? That was not explained to you before this very body? A. I believe it was.

Q. Is there any doubt in your mind? A. No.

Q. And was it further told to you that it meant that if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you gave could be and will be used against you? Was that explained to you? A. I believe it was, yes, sir.

Q. And did you tell this grand jury you understood that? A. That's right.

Q. And at that time, after those things were explained to you, you were asked, "Are you pre-

pared to sign a waiver of immunity? Answer: I am." Is that correct? Is that what transpired? A. I—well, at this point I would like to put on the record what is said and what actually happens may appear to someone who later reads this—

Q. The fact of the matter, the waiver was signed outside after it was explained to you outside? A. That's right.

Q. Then you were asked these questions in the grand jury repeating what had happened before? A. That's correct.

Q. And you were asked if you were still ready to sign a waiver of immunity; isn't that correct? A. It's months back now. I can't remember word for word, Mr. Andreoli. I would only be kidding myself, I would be kidding my—

Q. Were you asked this question before the grand jury, just so the record is complete in this single proceeding; the question being:

"When you signed this," referring to Grand Jury Exhibit 16, which you just identified, "did you understand that this was a waiver of immunity as I just described to you?"

"Answer: I did, sir."

Were you asked that and did you give that answer? A. I believe so, yes, sir.

Q. And did you understand the import of it? Did you say you did? A. At that time I did not.

Q. Did you say you did? A. Well, I at that time—

Q. All right. Now, you understand now that you are appearing before this grand jury, therefore, that you are now under oath, that the inquiry does

pertain to conspiracy to commit the crime of bribery of public officers, namely, police officers, in matters pertaining to the suppression of gambling; do you understand that? A. Yes, sir.

Q. You do. And do you understand further that you have appeared before Judge Schweitzer and the question as to whether or not you were required to answer questions was argued; is that correct? A. That's correct.

Q. And you understand that you were directed to answer on several prior occasions; is that correct? A. That's correct.

Q. All right. Now, so there will be no misunderstanding, you understand further that you are a potential defendant; you understand that? A. Well, you explained it to me, yes, sir.

Q. And do you understand further that regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity? Do you understand that? A. Yes, sir.

Q. Now, is there anything that you have been asked so far that you do not understand, Mr. Stevens? A. I wouldn't know how to answer that.

Q. Well, is there any questions in your mind that you wish to discuss with counsel before I proceed to the next question? A. Yes, I would, if I may.

Mr. Andreoli: All right. May we give this witness a moment to consult with counsel?

The Witness: Thank you.

(Witness leaves grand jury room at 2:58 p.m.
and returns at 3:02 p.m.)

By Mr. Andreoli:

Q. Now, Mr. Stevens, you have conferred with counsel? A. That's right, sir.

Q. What is the name of the attorney who is outside the grand jury room? A. Mr. John Schofield, S-c-h-o-f-i-e-l-d.

Q. And he has been representing you for some time now; is that correct? A. That's right.

Q. Now, Mr. Stevens, during the last five years, while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York? A. I refuse to answer that question, Mr. Andreoli, on my rights under the fifth, sixth and fourteenth amendments of the Constitution.

Mr. Andreoli: All right. Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer, who is now the presiding justice there.

Foreman: So directed.

(The witness, foreman, Mr. Andreoli, Mr. McGuire and the reporter leave the grand jury room.)

And the Court, on the said day, after hearing argument by John Schofield, Esq. of Molony & Schofield, counsel for the said James T. Stevens, and the District Attorney, by Peter D. Andreoli, Esq., Assistant District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason be-

ing given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following sets forth the pertinent parts of a proceeding which took place in Part 30 of the Supreme Court of the County of New York on January 11, 1965:

Mr. Andreoli: If Your Honor pleases, continuing with the First June 1964 Grand Jury, Mr. George Lyons, Foreman, is present in court. Mr. James T. Stevens, witness before that Grand Jury, is in court with his counsel Mr. John Schofield.

If Your Honor pleases, this grand jury, as Your Honor knows, has been inquiring into the crimes of conspiracy to commit the crime of bribery of public officials; in this instance, police officers in matters dealing with the suppression of gambling.

This witness, Lieutenant—former Lieutenant James T. Stevens appeared before this grand jury on June 26, 1964. At that time he was a police officer of the Police Department of the City of New York. He was advised of his right—constitutional right, and so forth, and at that time signed a waiver of immunity and testified before that grand jury.

I therefore offer first in evidence the—deemed marked—the grand jury testimony of James T. Stevens for the date June 26, 1964, at which time, as I see, he was sworn, signed a limited waiver of immunity after he was advised that he was a potential defendant in that investigation.

I also ask to have deemed marked Grand Jury

Exhibit 16 which is the limited waiver of immunity signed by Stevens at that time.

The Court: Mark it—deemed marked.

(Whereupon, grand jury testimony of James T. Stevens for the date June 26, 1964, was deemed marked People's Exhibit 1 in evidence, as of this date.)

(Whereupon, Grand Jury Exhibit 16, limited waiver of immunity signed by James T. Stevens, was deemed marked People's Exhibit 2 in evidence, as of this date.)

Mr. Andreoli: Now, this is indicating an application on behalf of this grand jury for a direction to James T. Stevens that he answer following questions. He appeared before this grand jury this afternoon, at which time he was again advised of his rights and he was further questioned or, at least, questions were put to him. And he was asked the following question—and may I call the grand jury reporter so that that may be accurately stated.

Will you take the stand.

(Whereupon, Mr. Felixbrod took the witness stand.)

Mr. Andreoli: What is your name—will you swear him?

The Court: The Clerk will swear the witness.

GEORGE FELIXBROD, called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Andreoli:

Q. Where do you live? A. 1407 Sheridan Avenue, Bronx.

Q. And are you a grand jury stenographer, County of New York? A. I am.

Q. And were you assigned to the First June 1964 Grand Jury this afternoon? A. I was.

Q. And during the course of the proceedings before that grand jury, did the person now appearing before the Court James T. Stevens appear before that grand jury? A. He did.

Q. And at that time was he advised that he had been previously sworn before that grand jury? A. Yes.

Q. And he was advised of his rights, so forth; is that correct? A. That is correct.

Q. Now, at some point was a question put to the witness concerning his participation in possible conspiracy? A. Correct.

Q. And do you have the question that was asked of the witness? A. I do.

Q. Will you read that question, please. A. "Question: Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit these bookmakers, policy operators and gamblers to conduct their gambling operations in violation of the Penal Law of the State of New York?"

Q. What answer did the witness give, if any? A. "Answer: I refuse to answer that question, Mr. Andreoli, on my rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution."

"Question: All right.

"Mr. Andreoli: Mr. Foreman, I direct that the witness appear in Part XXX before Judge Schweitzer who is now the presiding Justice there.

"The Foreman: So directed.

Mr. Andreoli: If Your Honor pleases, upon behalf of the First June 1964 Grand Jury, I request the Court direct this witness to answer the question which he refused to answer before the grand jury, that question being material and relevant and very important to the inquiry now pending there.

* * * * *

The Court: Well, I first make the affirmative finding of law and fact that the question posed of the witness is a legal—constitutes a legal and proper interrogatory within the purview of the appropriate sections of the—Judiciary Law I believe is Section 750 of the Judiciary Law, Subdivision 5. And I will make the direction that he return to the Grand Jury and answer that question.

Now, I would like to have you, Mr. Schofield, confer with your client to determine whether or not he is prepared to comply with the Court's direction, because if this is just a futile statement on my part, then I can make a determination.

* * * * *

The Court: Will you read back the question, Mr. Stenographer, which was asked of the witness and which he refused to answer before the grand jury.

The Witness: "Now, Mr. Stevens, during the last five years while you were a member of the Police Department of the City of New York, did you receive any money from bookmakers, policy operators or other gamblers in order to permit

these bookmakers, policy operators and gamblers to conduct their gambling operation in violation of the Penal Law of the State of New York?"

The Court: Do you want to repeat your application?

Mr. Andreoli: Now, may we have the witness directed to answer the question, Your Honor.

The Court: Now, having heard the question, the Court now directs you to answer the question.

Mr. Andreoli: May we inquire whether the witness intend to comply with the Court's direction and answer the question before the grand jury?

Mr. Stevens: May I answer it?

The Court: You may.

Mr. Stevens: I refuse to answer on the grounds that I was not properly advised of my legal rights at the time of executing my waiver of immunity and I now wish to exercise my constitutional rights under the Fifth and Fourteenth Amendments of the U. S. Constitution; and, further, that my attorney has advised me that my rights under the Fifth, Sixth and Fourteenth Amendments of the U. S. Constitution have been violated and he has presently this appeal pending before the Court of Appeals before the State of New York.

Mr. Andreoli: I ask for judgment on behalf of the grand jury.

The Court: The Court now adjudges the witness in contempt pursuant to the pertinent provision of the Judiciary Law and direct that he be confined in the Civil Prison for a period of 30 days and fined the sum of \$250.00 and on failure of the witness to pay such sum he is to serve an additional 30 days. I will direct the District

Attorney to draw the appropriate mandate of the Court embodying the terms of this judgment. And I will direct the witness to appear before this Court on—

The Court: Friday at 3 o'clock, January 15th.

* * * * *

The witness James T. Stevens having on January 11, 1965, contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be committed to the custody of the Sheriff of the City of New York at Civil Jail, 434 West 37th Street, City and County of New York for a term of 30 days and said James T. Stevens be directed to pay a fine of \$250 and in default thereof, to serve an additional term of 30 days at Civil Jail.

.....

J S C

WAIVER OF IMMUNITY

THE PEOPLE OF THE STATE OF NEW YORK
AGAINST
JOHN DOE, et al.

I, LT. JAMES T. STEVENS, residing at 164 Engert Ave—
Bklyn., occupying the office of Police Officer in the Police
Dept. of the City of New York, do hereby waive all benefits,
privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment
for or on account of, regarding or relating to any matter,
transaction or thing, concerning the conduct of my office
or the performance of my official duties, or the property,
government or affairs of the State of New York or of any
county included within its territorial limits, or the nomination,
election, appointment or official conduct of any
officer of the city or of any such county, concerning any
of which matters, transactions or things I may testify or
produce evidence, documentary or otherwise, before the
1st, 1964 Grand Jury in the County of New York, in the
investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

JAMES T. STEVENS

Witness:

JEROME P. CRAIG

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON
Notary Public, State of New York
No. 03-4309493
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1965

Opinion of Appellate Division, First Department

22 App. Div. 2d 683
(253 N. Y. S. 2d 401)

Before :

BRIETEL, J. P., VALENTE, STEVENS, EAGER and BASTOW

Matter of Stevens, pet. (Marks, vs.)—Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the grand jury of New York County which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In *Regan v. New York* (349 U. S. 58), it was clearly held that one circumstanced as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to re-

fuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that *Regan v. New York* is controlling here, we do not reach the question as to the effect of *Mallory v. Hogan*, 378 U. S. 1 and *Escobedo v. Illinois*, 378 U. S. 478, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

Opinion of United States District Court for the Southern District of New York, Weinfeld, District Judge

The petitioner, until recently a lieutenant with the New York City Police Department, is in custody upon a third state court judgment of conviction for contempt,¹ arising out of his refusal to answer a question put to him by a grand jury investigating alleged police corruption. He seeks his release by Federal writ of habeas corpus on the ground that his rights under the Fifth and Sixth Amendments were violated when, given the choice under New York law either of executing a limited waiver of immunity or losing his job,² he signed the waiver. He did not then have the benefit of counsel. Having previously been twice convicted for failing to answer the same question, he also advances a further contention that his present imprisonment constitutes double jeopardy.

On June 25, 1964, petitioner was served with a subpoena commanding his appearance before a June grand jury of the Supreme Court, New York County. Before entering

¹ To prevent expiration of petitioner's sentence pending decision, this Court issued a writ pursuant to which he was brought into Federal custody and, in the absence of opposition from respondent, released on his own recognizance. See *Johnston v. Marsh*, 227 F. 2d 528, 530 n. 4 (3d Cir. 1955).

² N. Y. Const. art. 1, §6 provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself, providing that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office * * *." A similar provision is contained in N. Y. C. Charter §1123.

the jury room, he was advised by an assistant district attorney that, pursuant to state law, unless he signed a waiver of immunity he would forfeit his job. He signed the waiver, whereupon he was brought before the grand jury, informed that he was a potential defendant and advised of his right against self incrimination and of state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity. He then acknowledged he had executed the waiver and understood its effect. Petitioner was sworn, asked his name and similar preliminary questions, and then given a financial questionnaire to complete and return. His next appearance was before a July grand jury, when, represented by counsel, he declined to sign another waiver and asked to withdraw the earlier waiver on the ground that he had not had time to confer with counsel prior to its execution. The following day he was discharged from the Police Department because of his refusal to sign a new waiver before the July grand jury. He was then summoned to reappear before the June grand jury (the one before which he had signed a waiver) and refused to answer any questions, including one with respect to alleged payments from bookmakers and policy operators. Upon reiteration of his refusal to answer before a Justice of the State Supreme Court, he was adjudged in contempt, sentenced to serve thirty days, and fined \$250. Pending an appeal to the Appellate Division, he sought a stay of the sentence, which was denied.³ When the Appellate Division affirmed his conviction⁴ and leave to appeal to the

³ Following this denial he applied for a writ of habeas corpus in this Court, which Judge Herlands denied for failure to exhaust available state remedies, which disposition was affirmed by our Court of Appeals.

⁴ Stevens v. Marks, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1st Dep't 1964).

Court of Appeals had been denied, he had already served his sentence and paid the fine.

Upon expiration of his first contempt conviction, on September 28, 1964 he was again called before the June Grand jury and again refused to answer the question asked of him in July, whereupon he was held in contempt and sentenced to another term of thirty days and fined \$250.⁵ His third refusal to answer the question before the June grand jury resulted, on January 15, 1965, in his third summary conviction and imposition of a similar sentence.

[1, 2] It is the State's contention that section 2254 of Title 28, United States Code, requires dismissal of this application on the ground that petitioner has failed, with respect to this third conviction, to exhaust presently available state remedies by an Article 78 proceeding, although it recognizes that his unsuccessful state court test of the first conviction raised the same self-incrimination and right to counsel questions here pressed. This Court is of the view that the exhaustion doctrine does not require petitioner to go through the formality of a futile, time-consuming appeal each time he is adjudged in contempt for failure to answer the same question. Indeed, section 2254 expressly excuses resort to the state courts where, as here, there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." To require repeated and fruitless applications for state court relief would not only confine him to a revolving door process leading nowhere, but "invite the reproach that it

⁵ Prior to surrender on this second conviction, petitioner sought to remove the proceeding to the Federal court for this district, pursuant to 28 U. S. C. §1443. Judge MacMahon dismissed the petition on October 20, 1964.

is the prisoner rather than the state remedy that is being exhausted.”⁶

The State, however, is on firmer ground in advancing the exhaustion doctrine with respect to the petitioner’s claim of double jeopardy. It was never presented to the state courts for consideration, presumably in light of a just decided New York Court of Appeals decision rejecting a similar argument.⁷ It was first raised in the petition for the instant writ, but was neither briefed nor argued. In view of the Court’s basis for its disposition of this proceeding, it is unnecessary to consider whether the recent state rulings, which seemingly are dispositive of petitioner’s double jeopardy plea, relieve him of applying first to the state court before applying to this Court for relief on that ground.

[3, 4] A more basic question is presented, although the State does not raise it, by the circumstance that the petitioner still has ample time within which to challenge his first conviction in the United States Supreme Court. The New York Court of Appeals denied leave to appeal on February 4, 1965; thus petitioner has through May 5 to move for direct review,⁸ but he has taken no such step. *Fay v. Noia*⁹ overruled *Darr v. Burford*¹⁰ to the extent

⁶ *United States ex rel. Kling v. La Vallee*, 306 F. 2d 199, 203 (2d Cir. 1962) (concurring opinion).

⁷ *Matter of Ushkowitz v. Helfand*, 15 N. Y. 2d 713, 256 N. Y. S. 2d 339, 204 N. E. 2d 498 (1965), relying on *Second Add. Grand Jury v. Cirillo*, 12 N. Y. 2d 206, 237 N. Y. S. 2d 709, 188 N. E. 2d 138, 94 A. L. R. 2d 1241 (1963). Compare *Yates v. United States*, 355 U. S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957); *People v. Riela*, 7 N. Y. S. 2d 571, 200 N. Y. S. 2d 43, 166 N. E. 2d 840, appeal dismissed and cert. denied, 364 U. S. 474, 915, 81 S. Ct. 242, 5 L. Ed. 2d 221 (1960).

⁸ U. S. Sup. Ct. R. 11(1); 28 U. S. C. A. §2101(c).

⁹ 372 U. S. 391, 435, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

¹⁰ 339 U. S. 200, 79 S. Ct. 587, 94 L. Ed. 761 (1960).

that it conditioned Federal habeas corpus relief upon a prior certiorari application to the Supreme Court. But whether a prisoner may now proceed directly in a Federal district court to collaterally attack his state court conviction when a remedy is still available in the Supreme Court, and further, whether in an appropriate case the district courts have discretion to require pursuit of such available Supreme Court review,¹¹ is less clear.¹² Consistent with the Supreme Court's view that the "needs of comity" are adequately served by the exhaustion of state remedies and by the availability to the states of eventual review in the Supreme Court of Federal habeas corpus decisions,¹³ and that review by certiorari is more meaningful following compilation of a full and complete record by the lower Federal court, this Court concludes that a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him. However, the prisoner does not have an absolute right to bypass the Supreme Court. The district court, just as it has discretion to deny habeas corpus to a prisoner who has bypassed orderly state proce-

¹¹ See *Wade v. Mayo*, 334 U. S. 672, 680-681, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948), overruled in *Darr v. Burford*, 339 U. S. at 208-210, 70 S. Ct. 587, but arguably resurrected in *Fay v. Noia*, 372 U. S. at 435, 83 S. Ct. 822.

¹² The question is sometimes avoided by the petitioner's waiting ninety days before seeking Federal district court relief. See Appendix, p. 19a, *United States ex rel. Carthan v. Sheriff, City of New York*, 330 F. 2d 100 (2d Cir. 1964). Imposition of such a ninety-day waiting period, however, seems contrary to Fay v. Noia's advocacy of "swift and imperative justice on habeas corpus." 372 U. S. at 435, 83 S. Ct. at 847.

¹³ *Fay v. Noia*, 372 U. S. at 437-438, 83 S. Ct. 822.

dures,¹⁴ also has discretion to require him to exhaust currently available Supreme Court remedies. And the circumstances of this case justify requiring the petitioner here to seek such review.

[5] First, an appropriate amendment by the New York Court of Appeals of its remittitur would enable petitioner to appeal from the contempt conviction as of right on the ground that a state statute was "drawn in question" and upheld over his Federal constitutional objections.¹⁵ Secondly, failing to secure an adequate amendment to the remittitur to permit such an appeal as of right, petitioner would still be in a position to apply for certiorari; and in either event, bail could be granted.¹⁶ Thirdly, unlike most such applications,¹⁷ the petitioner's was prepared by counsel and presents an adequate basis for decision. Finally, petitioner's success depends upon reconsideration of a Supreme Court decision which, so long as its validity remains unimpaired, this Court regards as dispositive of petitioner's claim.

In *Regan v. People of State of New York*,¹⁸ a New York City policeman was summoned before a grand jury investigating corruption. He, too, executed a waiver of immunity, then sought to repudiate it on the ground that at the time of its execution he was under economic duress

¹⁴ *Id.* at 438; 83 S. Ct. 822.

¹⁵ 28 U. S. C. §1257(2). Of course, petitioner must apply for and obtain an amended remittitur indicating consideration and disposition of his Federal contentions. See *Ungar v. Sarafite*, 376 U. S. 575, 582-583, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

¹⁶ 18 U. S. C. §3144; *Hudson v. Parker*, 156 U. S. 277, 284-287, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

¹⁷ See *Brown v. Allen*, 344 U. S. 443, 492-495, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (separate opinion by Frankfurter, J.).

¹⁸ 349 U. S. 58, 75 S. Ct. 585, 99 L. Ed. 883 (1955).

and unclear as to his rights. Regan was convicted of contempt, although by a jury, for refusing to answer questions put to him by the grand jury. The Supreme Court held that, where there was an adequate immunity statute, Regan had no constitutional right to remain silent, and that his contentions with respect to the waiver were premature. Said the Court:¹⁹

"The waiver of immunity, although it does affect the possibility of subsequent prosecution, does not alter petitioner's underlying obligation to testify. Much of the argument before this Court has been directed at the question of whether the waiver of immunity was valid or invalid, voluntary or coerced, effectual or ineffectual. That question is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired.

* * * * *

"The invalidity of the waiver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify."

Petitioner's attempts to distinguish Regan are unpersuasive, the factual differences in the two cases appearing to have no relevance to the ground of decision there. Moreover, the Supreme Court last Term reaffirmed the basic premise underlying Regan: that valid state immunity legislation empowers a state to compel testimony

¹⁹ Id. at 62, 64, 75 S. Ct. at 587, 588.

which would otherwise be self-incriminating.²⁰ Unless Regan is to be overruled, resolution of petitioner's contentions concerning the validity of the waiver must await an attempt to prosecute him on the basis of compelled testimony,²¹ or an adjudication with respect to his employment rights.²² The District Court should not be called upon to divine whether Regan remains controlling authority. So long as an avenue to the Supreme Court is open, petitioner in these circumstances ought to avail himself of it.

The writ upon which petitioner was brought into Federal custody is dismissed and petitioner, having been released on his own recognizance pending determination of this proceeding, is directed to surrender to the State within five days.

²⁰ See *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 79, 93-100, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). The relevance of *Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) is less clear, since the Regan court seems to have proceeded on the assumption that the self-incrimination clause did apply.

²¹ See *People v. Guidarelli*, 255 N. Y. S. 2d 975 (3d Dep't 1965).

²² There is currently pending in the State Supreme Court petitioner's Article 78 proceeding to review his discharge. The State's answer contains an offer to restore petitioner to his position with back pay, provided he testifies pursuant to the waiver now under attack.

Opinion of United States District Court for the Southern District of New York, Herlands, District Judge

On June 26, 1964, the petitioner executed a limited waiver of immunity before the New York County grand jury, in accordance with the provisions of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter.

On July 15, 1964, he refused to testify before a grand jury, asserting that he wished to withdraw the waiver.

On July 22, 1964, when again subpoenaed before a grand jury, he renewed his request to withdraw the waiver of immunity; and he refused to answer any questions before the grand jury.

On the same day, he was brought before Honorable Charles A. Marks, Justice of the Supreme Court of the State of New York, County of New York, who asked the petitioner the following question:

"Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

The petitioner refused to answer the question on the asserted grounds that his State and Federal constitutional rights privileged him to remain silent.

Petitioner was adjudged guilty of criminal contempt by Mr. Justice Marks on July 30, 1964. He was sentenced to serve a term of thirty days and to pay a fine of \$250.

Execution of the mandate of order was stayed for five days to permit an application for a stay to the Appellate Division of the Supreme Court for the First Department.

The Honorable Bernard Botein, Presiding Justice of the Appellate Division, denied the application for the stay but granted an order allowing the petitioner to have oral argument of his appeal on September 9, 1964.

The petitioner commenced serving the term on August 5, 1964. This term will expire on September 4, 1964. He is presently confined in the New York Civil Jail.

On August 5, 1964, a writ of habeas corpus was allowed by this Court and made returnable on August 10, 1964, at which time the matter was argued.

This petition for a writ of habeas corpus is hereby denied for three interrelated reasons.

I.

[1] An Article 78 proceeding in the nature of an appeal (N.Y.C.P.L.R. Section 7801 et seq.) is now pending before the Appellate Division of the New York State Supreme Court for the First Department. That proceeding has been set down for argument on September 9, 1964. Therefore, this State remedy has not been exhausted. See, e. g., *Shelton v. State of South Carolina*, 285 F.2d 540 (4th Cir. 1961); *People of State of New York ex rel. Epps v. Nenna*, 214 F.Supp. 102 (S.D.N.Y.1963); *People of State of New York ex rel. Cuomo v. Fay*, 149 F.Supp. 352 (S.D.N.Y.1956); *People of State of New York ex rel. Mino v. Jackson*, 148 F.Supp. 757 (S.D.N.Y.1957).

[2] This Court considers the petitioner's claim that he has exhausted available State remedies to be of doubtful validity. The doubt is resolved in favor of a procedure

that affords the State courts an opportunity to determine the substantive questions of constitutionality raised by the petitioner. See *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 94 L.Ed. 761 (1950); *United States ex rel. Kling v. LaVallee*, 306 F.2d 199, 202 (2d Cir. 1962).

II.

[3] In extraordinary circumstances, the federal court may dispense with rigid compliance with the general requirement that State remedies be exhausted before invoking federal habeas corpus. *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952).

This requires an evaluation of the particular facts and circumstances on a case-by-case basis. See *Frisbie v. Collins*, *supra*, at 521, 72 S.Ct. 509.

[4] There is nothing extraordinary about the present situation. On the contrary, this appears to be a garden variety contempt case, where a municipal employee refuses to answer material questions before a county grand jury after having signed a limited waiver of immunity. The grant or refusal of a stay of execution of a criminal contempt sentence is an ordinary exercise of judicial judgment by the State courts. This is routine litigation.

III.

A frank and realistic appraisal of the present proceedings clearly indicates that the novel and far-ranging constitutional issues posed by the petitioner would require extensive research and mature deliberation. The practicalities of judicial administration, therefore, pointedly suggest that, by the time such a decision on the substantive constitutional issues were rendered, the same questions could probably be determined by the New York appellate courts.

The United States Supreme Court has repeatedly emphasized the necessity for a circumspect approach in dealing with sensitive matters of federalism, that is, federal-state court jurisdiction. See *Darr v. Burford*, *supra*; *Fay v. Noia*, 372 U.S. 391, 419-420, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

Were this Court to rush in and summarily adjudicate issues that will come before the Appellate Division of the State Supreme Court in less than a month, such procedure might take on the undesirable aspect of a judicial race.

These desiderata persuasively indicate that this Court, in the exercise of its discretion, should decline to grant the writ. See *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 46 S.Ct. 1, 70 L.Ed. 138 (1925).

The petition for the writ of habeas corpus is denied. So ordered.*

* Motion for bail pending appeal from this order was denied by Circuit Judge Leonard P. Moore, August 21, 1964.

**Opinion of the United States Court of Appeals for the
Second Circuit**

KAUFMAN, Circuit Judge:

The principal issue on this appeal is whether a municipal employee could properly refuse to testify before a state grand jury by merely asserting that he did not voluntarily waive the immunity from prosecution conferred by state law. Although the validity of the waiver executed by the petitioner, James T. Stevens, has yet to be determined, he has thrice been adjudged in criminal contempt for refusing, despite directions from two New York State Supreme Court justices, to answer questions propounded by the grand jury. Claiming that he had exhausted the state remedies available to contest his first contempt conviction, the petitioner applied for a writ of habeas corpus in the United States District Court to challenge the third conviction, which like the first two carries a sentence of thirty days' imprisonment, a \$250 fine and in default of the fine an additional 30-day prison term. The District Court denied relief, alluding to a directly relevant Supreme Court holding, *Regan v. New York*, 349 U. S. 58 (1955), that any contentions respecting the validity of the waiver of immunity are, under such circumstances, premature and do not alter the underlying obligation to testify. We affirm.

The basic facts are undisputed, although seemingly complicated—as the following recitation will indicate—by petitioner's repeated efforts to test, in both the state and federal courts, his duty to testify. Stevens, a lieutenant in the New York City Police Department, was first served with a subpoena the morning of June 25, 1964, commanding his appearance as a witness before the First June 1964

Grand Jury, which was then investigating alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Outside the grand jury room, Stevens, without counsel at the time, was advised by an assistant district attorney to sign a limited waiver of immunity; otherwise, pursuant to the state constitution and city charter,¹ he would be subject to removal from office. Stevens executed the waiver and went before the grand jury. There he was informed that he was a potential defendant and advised of his privilege against self-incrimination and the state constitutional and city charter provisions requiring public employees to execute limited waivers of immunity or else suffer disqualification from office for five years. Petitioner then acknowledged that he had already executed the waiver of immunity and understood its effect. He answered a few perfunctory questions, identifying himself by name, address, rank and police command, and was dismissed with instructions to return at a later date with a completed financial questionnaire.

On July 15, having been subpoenaed to appear before the Third July 1964 Grand Jury, Stevens—now represented and advised by counsel—declined to sign a new limited waiver of immunity prior to giving any further testimony before this grand jury. At that time he also sought to withdraw the waiver he had previously signed in connection with his appearance before the First June 1964

¹ The New York State Constitution, art. I, sec. 6, provides in part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office . . ." A similar provision may be found in New York City Charter §1123.

Grand Jury, claiming that he had been denied the right to consult with counsel when it was executed. As a consequence of these actions, Stevens received formal notice, the following day, that his employment as a police lieutenant was terminated.

One week later, on July 22, Stevens was summoned to reappear before the First June 1964 Grand Jury. He quickly informed that body of his discharge from the police department since his appearance on June 25 and his attorney's advice that, notwithstanding the waiver he had previously signed, he had a constitutional privilege not to testify unless immunity from prosecution was expressly conferred. He was then asked the following question which he refused to answer on the ~~aforesaid~~ ground:

Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York?

Petitioner thereafter was directed by a judge of the State Supreme Court to answer the question and warned of the consequences if he persisted in invoking his purported federal constitutional privilege not to testify. Stevens remained steadfast in his refusal and was adjudged in criminal contempt.

While a review of this contempt citation was pending in the state courts but after expiration of the 30-day prison sentence,² Stevens was again subpoenaed on September 28,

² While serving his 30-day sentence, Stevens applied to the United States District Court for a writ of habeas corpus, claiming that his privilege against self-incrimination and right to counsel had been abridged in the state court proceedings. Judge Herlands denied the petition, noting that an Article 78 proceeding in the nature of an appeal, New York Civil Practice Law and Rules §7801, was then pending before the Appellate Division and, therefore, Stevens had not met the general requirement, 28 U. S. C. §2254, that available state remedies be exhausted before invoking federal habeas corpus.

1964, to reappear for the third time before the same First June 1964 Grand Jury. Once more the question regarding receipt of payments from gamblers was posed and again petitioner persevered in his refusal to respond. This contumacious conduct led to a second judgment of criminal contempt, imposed by another judge of the State Supreme Court.³

During the period when petitioner was serving his second 30-day contempt sentence, the Appellate Division of the Supreme Court dismissed his petition seeking to annul the first judge's adjudication of contempt. *Stevens v. Marks*, 22 App. Div. 2d 683, 253 N. Y. S. 2d 401 (1964). The Court, citing the Supreme Court's decision in *Regan v. New York, supra*, held that Stevens' challenge to the validity or effectiveness of the waiver of immunity, although available as a defense in any subsequent prosecution which might arise from the grand jury probe, was not a sufficient justification for refusing to testify at this preliminary stage in the proceedings.

After Stevens completed serving the second sentence and while his motion for leave to appeal from the Appellate Division's adverse decision was pending before the New York Court of Appeals, he was subpoenaed, on January 15, 1965, to appear for the fourth time before the First June 1964 Grand Jury. He continued to persist in his refusal to testify, both before that body and in the

³ Instead of taking advantage of the five days afforded to apply to the Appellate Division of the State Supreme Court for a stay of execution of the second contempt conviction pending appeal, Stevens sought to remove the proceedings to the Federal District Court pursuant to 28 U. S. C. §1443. Judge MacMahon vacated and dismissed the removal petition, indicating that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance. He noted, moreover, that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right.

face of the judge's new direction. Accordingly, Stevens was adjudged guilty of criminal contempt for the third time and once more sentenced to 30 days' imprisonment, a \$250 fine and in default thereof an additional prison term of 30 days. When the New York Court of Appeals subsequently denied leave to appeal from the judgment dismissing the petition to set aside the first adjudication of contempt,⁴ Stevens—who was then in civil prison—filed his present petition for a writ of habeas corpus. Judge Weinfeld denied federal relief, but thereafter issued a certificate of probable cause and released petitioner on his own recognizance pending this expedited appeal.

I.

Initially, we note that by testing his first conviction in the state courts—raising basically the same issues now presented⁵—Stevens satisfied the predicate for federal habeas corpus review of his third conviction. The requirement that presently available state remedies with respect to the third conviction be exhausted does not apply where, as here, "circumstances [render] such process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. To

⁴ An Article 78 proceeding by which Stevens seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal, is currently pending in the state courts. The Corporation Counsel's answer includes an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged.

⁵ Stevens does claim, for the first time in this petition, that the third conviction subjects him to double jeopardy. But this contention was neither briefed nor argued here and, more important, never presented to the state courts for consideration. Insofar as the present petition is based on this claim, we hold that it is premature for failure to exhaust presently available state remedies. 28 U. S. C. §2254; *United States ex rel. Tangredi v. Wallack*, — F. 2d — (2 Cir. April 1, 1965); *United States ex rel. Bagley v. LaVallee*, 332 F. 2d 890, 892 (2 Cir. 1964).

require a needless, purely formal application for state court relief each time Stevens is adjudged in contempt for not answering the identical question would, as the District Court noted, "not only confine [petitioner] to a revolving door process leading nowhere, but 'invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.' "

The District Court did, however, in the exercise of its discretion, deny relief because at that time Stevens could still seek Supreme Court review, by direct appeal or certiorari, of the first conviction. It is not necessary for us to pass on the propriety of that ground for decision. On the last day possible Stevens successfully applied to Circuit Justice Harlan for an extension of time in which to file a petition for a writ of certiorari. But since this appeal has not been withdrawn and our resolution of the Constitutional issues might be of some assistance to the Supreme Court, to which these same issues will be presented in the certiorari application on the first conviction, we deem it appropriate to turn to the merits, a procedure dictated by sound considerations of judicial administration and the course of state litigation on the original conviction, which is in no way antithetical to the needs of comity in our delicately balanced federal system.

II.

The basic and crucial attack by Stevens on all the contempt convictions is grounded on his contention that he could not constitutionally be obligated to testify before a grand jury without an express grant of immunity from prosecution. He brushes aside the effect of the limited waiver of immunity, claiming that his privilege against self-incrimination and right to counsel were infringed when, under the compulsion of New York law and without

the benefit of proper legal advice, he executed the waiver in order to save his job.

But these contentions are, if we are to harmonize our holding with *Regan v. New York, supra*, prematurely advanced and cannot excuse Stevens' contumacious refusal, after repeated judicial directions, to cooperate with the grand jury. The facts of *Regan*—not significantly distinguishable from the instant case—deserve brief mention. *Regan*, also a member of the New York City Police Department, was summoned before a grand jury investigating the alleged association of municipal policemen with criminals, racketeers, and gamblers. At first, he too executed a waiver of immunity, but later—after his employment with the police department had been severed—reconsidered his original waiver and refused to answer the grand jury questions, claiming that the waiver was obtained by a "pattern of duress and lack of understanding." The Supreme Court upheld his conviction for criminal contempt, noting that the validity *vel non* of the waiver was "irrelevant" because, given a valid state immunity statute, there was no possible justification for not testifying.

That holding—its force unimpaired by intervening decisions—is dispositive of Stevens' claims. Justice Reed's exposition of the decision's rationale is significant: "The invalidity of the waver may be made a defense to subsequent prosecution, where it would be a proper matter for disposition; it is no defense to a refusal to testify." 349 U. S. at 64. Indeed, if Stevens' waiver is defective because he should have had the advice of counsel before signing the instrument, or his federal constitutional rights were abridged by the state requirement that he sign a waiver to preserve his public office, or if he should have been permitted to withdraw the waiver, even then, as we

view the relevant provisions of the state penal law, immunity from prosecution will automatically follow.⁶

The question before us is, therefore, a narrow one: Should a witness be permitted to test the validity of a waiver of immunity prior to testifying before the grand jury? We hold that the resolution of any challenge to the waiver must abide the state's subsequent prosecution on the basis of the allegedly compelled testimony, if in fact that course is ever taken by the state. Although we recognize that the grand jury witness is thus placed in a quandary because he is not sure of the status of his waiver, this incertitude cannot bar the state from obtaining his testimony. "[T]he Constitution does not require," the Supreme Court has told us, "the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction... The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan v. New York*, 349 U. S. at 64.

⁶ The New York Penal Law §381(2) provides: "In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

Section 2447(1) of the Penal Law provides: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein."

Furthermore, we do not regard *Regan* as having been weakened, much less *sub silentio* overruled, by *Malloy v. Hogan*, 378 U. S. 1 (1964), which applied the Fifth Amendment's privilege against self-incrimination to the states via the Fourteenth Amendment due process clause. As we read the several opinions in *Regan*, the entire Court assumed, *arguendo*, that the self-incrimination clause could be utilized in state proceedings. Moreover, *Malloy's* relevance is limited; if Stevens is eventually prosecuted, he can, relying on that decision, question the validity of his alleged waiver of the privilege against self-incrimination, urging as he does now that he was compelled to testify or forfeit his public employment by an unconstitutional state law. But see *Slochower v. Board of Higher Education*, 350 U. S. 551, 558 (1956); *Garner v. Board of Public Works*, 341 U. S. 716 (1951); *United States ex rel. Carthan v. Sheriff*, 330 F. 2d 100 (2 Cir.), cert. denied, 379 U. S. 929 (1964). Chief Justice Warren foresaw the availability of the point upon a subsequent prosecution based upon the allegedly compelled testimony, when he wrote, in his separate concurrence in *Regan*, that "substantial federal questions may arise if the petitioner is again called upon to testify concerning bribery on the police force while he was an officer and if he is thereafter denied immunity as to any offenses related to the investigation." (349 U. S. at 65 (emphasis added).) We are not aware that it has ever been held that the privilege conferred by the self-incrimination clause of the Constitution creates an absolute right to remain silent under all circumstances in the face of a valid inquiry into official misconduct; rather, it is a shield which protects a witness from being compelled to give testimony which could be used against him in a criminal proceeding flowing from the grand jury testimony. See *Feldman v. United States*, 322 U. S. 487, 499 (1943).

Finally, we note that on the very day *Malloy* was decided, the Supreme Court reaffirmed the basic premise on which *Regan* rests: valid immunity legislation permits a state to compel otherwise self-incriminating testimony. *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964). Because New York's immunity statute is adequate on its face, we do not believe that Stevens had any constitutional right to refuse to testify before the grand jury. His contempt convictions, therefore, were proper.

Affirmed.

New York State Constitution, Article 1, Section 6

§ 6. [Grand jury; protection of certain enumerated rights; waiver of immunity by public officers; due process]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of

any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York City Charter, Section 1123

§ 1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its terri-

torial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former § 903.*)

Waiver of Immunity

I, Lt. James T. Stevens, residing at 164 Engert Ave.
Bklyn., occupying the office of Police Officer in the Police
Dept. of the City of New York, do hereby waive all bene-
fits, privileges, rights and immunity which I would other-
wise obtain from indictment, prosecution and punishment
for or on account of, regarding or relating to any matter,
transaction or thing, concerning the conduct of my office
or the performance of my official duties, or the property,
government or affairs of the State of New York or of any
county included within its territorial limits, or the nomina-

tion, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

JAMES T. STEVENS

Witness:

JEROME P. CRAIG

State of New York
County of New York—ss.:

On this 26 day of June, 1964 before me personally appeared James T. Stevens, to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

JANET D. WINSTON

JANET D. WINSTON,
Notary Public,
State of New York,

No. 03-4309493,
Qualified in Bronx County,
Certificate filed in New York County
Commission Expires March 30, 1965.

**Order of United States Court of Appeals for the
Second Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of May one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARO,
Chief Judge.

HON. THOMAS W. SWAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES ex rel. JAMES T. STEVENS,
Relator-Appellant,

AGAINST

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent-Appellee.

Appeal from the United States District Court of the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSABO
Clerk

Order of United States Court of Appeals, Second Circuit**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of June, one thousand nine hundred and sixty-five.

Present: Hon. J. EDWARD LUMBARD,
Chief Judge,
HON. THOMAS W. SWAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

U. S. ex rel. JAMES T. STEVENS,
Relator-Appellant,
v.

JOHN J. McCLOSKEY, Sheriff of New York City,
Respondent-Appellee.

A motion having been made herein by counsel for the appellant to stay the issuance of the mandate pending a petition for writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

A. DANIEL FUSARO
Clerk

SUPREME COURT OF THE UNITED STATES

Nos. 210 AND 290.—OCTOBER TERM, 1965.

James T. Stevens, Petitioner,
210 v.
Charles Marks, Justice of the
Supreme Court of New
York, County of New York.

On Writ of Certiorari to
the Appellate Division
of the Supreme Court
of New York, First Ju-
dicial Department.

James T. Stevens, Petitioner, On Writ of Certiorari to
290 v. the United States Court
John J. McCloskey, Sheriff of Appeals for the Sec-
New York City. ond Circuit.

[February 28, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a member of the New York City Police Department, was summarily discharged on July 15, 1964. On June 26 he had been subpoenaed before a New York County grand jury, known as the First June 1964 Grand Jury. Before appearing in the grand jury room, an Assistant District Attorney advised him to sign a waiver of immunity, saying that otherwise he would be subject to removal from public office.¹ He signed the

¹ Article I, § 6, of the New York Constitution provides in part: "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of

waiver.² Thereupon he was an unsworn witness before the grand jury:

"Q. Lieutenant . . . Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

"A. I do.

"Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

"A. I do.

"Q. Do you understand that under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you; do you understand that?

"A. I do.

"Q. Do you understand further that under the New York State Constitution, the New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general."

² The waiver read in part:

" . . . all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the . . . official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

"A. I do.

"Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

"A. I do.

"Q. Are you prepared to sign a waiver of immunity?

"A. I am."

That petitioner's waiver of "all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment" covered both the *privilege* against self-incrimination and *immunity* from prosecution³ is evidenced by the foregoing colloquy.

Then petitioner was sworn, asked a few questions, given a questionnaire to fill out, and asked to return with it completed.

At these stages petitioner had no counsel. On July 15, he returned to a different grand jury—the Third July 1964 Grand Jury. Now he had counsel and refused to sign a waiver of immunity. He was examined, as before, concerning his knowledge that to save his job he had to waive his immunity. He acknowledged that he knew the consequences of his refusal to waive his immunity and was excused.

³ This was the view of the Appellate Division which, when affirming petitioner's first contempt conviction, said: "[I]f the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify." — App. Div. 2d —, —.

That same day, as a consequence of his refusal to waive immunity before the Third July 1964 Grand Jury, petitioner was discharged as a police officer.

On July 22 he was again summoned before the First June 1964 Grand Jury and put a certain question which he refused to answer on the basis of his state and federal⁴ constitutional rights. He was brought before a judge who directed him to answer the questions. He refused to answer "on the grounds stated in the State and Federal Constitution" and the judge found him in contempt. On July 28, a hearing was held, at which petitioner, through his counsel, contended that the waiver was invalid or alternatively, had been effectively withdrawn. In either event his Fifth Amendment claim was valid under *Malloy v. Hogan*, 378 U. S. 1. For it was agreed that "there is no claim that this witness has been given immunity."⁵ At the conclusion of the hearing, petitioner was fined \$250 and given 30 days in the civil jail in New York City for that contempt. Petitioner promptly appealed to the Appellate Division of the New York Supreme Court. While this appeal was pending, he sought and was denied federal habeas corpus. *Application of Stevens*, 234 F. Supp. 25. The Appellate Division dismissed the appeal, stating its belief that *Regan v. New York*, 349 U. S. 58, was controlling.⁶ — App. Div.

⁴ *Malloy v. Hogan*, 378 U. S. 1, holding that the Fourteenth Amendment guaranteed a witness the protection of the Fifth Amendment's privilege against self-incrimination, was decided June 15, 1964.

⁵ Petitioner's counsel made the following statement: "May we also have the record clarified, Your Honor. It is my understanding, based on what was said here the last time in court before Your Honor, that there is no claim that this witness has been given immunity. The claim is that he has signed a valid waiver and that he refused to testify under it, and that is why Your Honor has found him guilty of criminal contempt, is that right?" The court replied, "That covers the situation."

⁶ *Regan v. New York* arose under an earlier version of the New York immunity law, which conferred *automatic* immunity from

2d —. The New York Court of Appeals denied leave to appeal. — N. Y. 2d —. This is the conviction which is the basis of the petition in No. 210.

Thereafter, on September 28, petitioner was summoned again before the First June 1964 Grand Jury. Once again a question was put him and once more he refused to answer, claiming his privilege which, as we have said, was available to him under *Malloy v. Hogan, supra*, if the waiver was invalid or had been effectively withdrawn. He was brought before another judge who directed him to answer the question. On refusal, petitioner was held in contempt and fined \$250 and sentenced to 30 days in jail.⁷ On January 11, 1965, petitioner was once more summoned before the First June 1964 Grand Jury and refused again to answer a question on the ground that it was incriminating. He was taken before a judge and directed to answer. On his refusal he was fined \$250 and sentenced to 30 days. While serving that jail term, petitioner once again sought a writ of habeas corpus in the United States District Court. The court denied relief, indicating that it regarded *Regan v. New York, supra*, binding authority. *United States ex rel. Stevens v. McCloskey*, 239 F. Supp. 419. The Court of Appeals for the Second Circuit affirmed. 345 F. 2d 305. It is

prosecution on anyone who testified before the grand jury. Regan had, like petitioner, executed a waiver of immunity and later sought to repudiate it. Unclear of his rights, Regan refused to testify though ordered to do so. This court affirmed his contempt conviction, refusing to consider questions raised as to the validity of his waiver and the efficacy of his efforts to withdraw it. The Court's theory was that regardless of the validity of the waiver, Regan was bound to answer the questions put to him: If the waiver was valid and binding, then of course he must answer since he had waived the right to refuse to do so. If the waiver was invalid, then petitioner would have immunity from prosecution, and thus could not rely on the privilege against self-incrimination.

⁷ This sentence was served.

this last conviction that is the basis of petitioner's application for a writ of habeas corpus in No. 290.

Both cases are here on writs of certiorari. 382 U. S. 809.

Not once in any of the hearings was petitioner told that if he responded with incriminating answers, the state immunity statute might preclude a prosecution based on such answers. On the contrary, the Assistant District Attorney made it clear that the view of the prosecution was that petitioner had waived any rights he might have had under the immunity statute:

"Q. And was it further told to you that it meant that if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you gave could be and will be used against you? Was that explained to you?

"A. I believe it was, yes, sir.

"Q. And did you tell this grand jury you understood that?

"A. That's right."

The Assistant District Attorney went on to say:

"Q. And do you understand further that regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity? Do you understand that?

"A. Yes, sir."

As we read this record, petitioner was led to believe that he could invoke his federal privilege against self-incrimination only at the pain of losing his public employment; that to retain his job he was obliged to sign a

waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions. Throughout the various appearances petitioner made before the grand juries and in the New York courts which held him in contempt, the prosecution consistently maintained that petitioner's waiver was valid. And there was never any suggestion that if, as petitioner contended, the waiver *were* invalid or effectively withdrawn, he might obtain a valid immunity from subsequent prosecution.

Here lies the difference between this case and *Regan v. New York*. For after that case arose, New York amended its immunity statute. Instead of conferring automatic immunity on all witnesses who testify before the grand jury, immunity is now conferred "only by strict compliance with the procedural requirements of our immunity statutes properly enacted . . ." *People v. Laino*, 10 N. Y. 2d 161, 173. Section 381 of the Penal Law, as amended in 1953,⁸ provides that in any bribery investigation "the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions" of § 2447. The latter section provides that an investigating grand jury is among these "authorized to confer immunity" in a proceeding relating to bribery, provided that certain procedural steps are taken: (a) the witness must refuse to answer on the ground of self-incrimination; (b) the grand jury must then be "expressly requested by the prosecuting attorney to order such person to . . . answer; (c) the grand jury must then order the person to answer; (d) the witness must then comply with the order to answer; and (e) thereupon "immunity shall be conferred." Under these laws, immunity is not automatically conferred "merely by testifying." *People v. Laino, supra*, at 172. "Complete

⁸ See *Regan v. New York*, 349 U. S. 58, 59, note 2 and accompanying text, for a discussion of the earlier version of that section.

immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted . . . or by virtue of immunity provisions in our State Constitution . . ." *Id.*, at 173.

In the present case neither the prosecutor nor the grand jury had any thought of conferring immunity on petitioner. They tried to hold petitioner to his waiver. Yet if he had gone ahead and testified and it were established in a later prosecution that his waiver was invalid, it seems that he would have been bereft of any immunity under the New York law, since the requirements of "strict compliance" had not been met.⁹ Accordingly, only if the petitioner's waiver was valid and binding was he bound to testify—at least until the affirmative steps necessary to confer immunity were taken. Whether or not petitioner could validly assert the privilege against self-incrimination depends on whether the waiver was, as he contends, invalid or effectively withdrawn. Although the trial judge which first found him in contempt ruled that the waiver was valid, the Appellate Division considered that question irrelevant in light of *Regan v. New York*.

Since, as we have seen, *Regan* is inapposite, we conclude that at the time petitioner was held to be in contempt, he had—as a matter of federal constitutional law—effectively withdrawn the waiver. When petitioner was asked to waive his federally secured right to refuse to answer the questions, he was informed that failure to execute the waiver would result in the loss of his public employment. Although it put petitioner to "a choice

⁹ That immunity was never properly conferred on petitioner was, as we read this record, recognized by petitioner's counsel and by the judge which first found him in contempt of court. See note 5, *supra*, and accompanying text.

between the rock and the whirlpool" (*Frost Trucking Co. v. Railroad Comm'n*, 271 U. S. 583, 593), New York says that, having "voluntarily" waived his constitutional rights, petitioner may not thereafter claim his privilege. At petitioner's first appearance before a grand jury after having consulted with counsel, petitioner attempted to do just that: he announced his intention to withdraw his waiver.

Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw it.¹⁰ We hold that petitioner's effort to withdraw the waiver was effective, and that in the absence of an immunity provision clearly made applicable to him, petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions.

One final point remains. Although the courts below did not consider the possibility, the briefs suggest that petitioner might, quite apart from the statutory immunity conferred by § 2447, have been given immunity by operation of law. It is said that, as the New York courts have interpreted the state constitution, a potential defendant may not be compelled to appear before a grand jury; any testimony given by him during such an appearance may not thereafter be used against him. *People v. Steuding*, 6 N. Y. 2d 214; *People v. Laino*, 10 N. Y. 2d 161. Thus it might be thought that this "automatic" immunity resulting from petitioner's appearance before

¹⁰ As for the suggestion that withdrawal of the waiver in mid-hearing poses an administrative inconvenience, we only note that there was no such inconvenience here. Petitioner had answered only a few perfunctory questions at his first appearance before the grand jury. He asserted his desire to withdraw the waiver immediately upon returning before the grand jury.

the grand jury makes this case precisely identical with *Regan*. We cannot agree. We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or its fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on "independent" evidence (*People v. Laino, supra*; *People v. Ryan*, 11 App. Div. 2d 155)—constitutes that "absolute immunity against further prosecution" about which the Court spoke in *Counselman v. Hitchcock*, 142 U. S. 547, 586, and which the Court said was necessary if the privilege were to be constitutionally supplanted. And see *Albertson v. Subversive Activities Control Board*, 382 U. S. 70, 79-81. For even if the *Steuding-Liano* immunity were available to petitioner, he was led to believe—as we have already seen—that no immunity provisions were applicable to his case.

In this sense the case is very close to *Raley v. Ohio*, 360 U. S. 423, where the existence of immunity was never suggested to the witnesses, later held in contempt. In that case the State Supreme Court held that the immunity under the statute was automatically available to the witnesses and advice of the investigating agency was not necessary. But we reversed those judgments of conviction since what the State was doing was "convicting a witness for exercising a privilege which the State clearly had told him was available to him" (*id.*, at 438), and we went on to say:

"A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta v. New Jersey*, 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States v. Cardiff*, 344

U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson v. United States*, 318 U. S. 189, 197. The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances." *Id.*, at 438-439.

Raley demonstrates that the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him.¹¹ This, it seems to us, is the teaching of *Raley*, and accordingly the *Steuding-Liano* immunity—if otherwise applicable—cannot now be invoked to validate this contempt conviction.

Reversed.

¹¹ The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt. A declaration that there was a valid immunity uttered for the first time on appeal would come too late.

SUPREME COURT OF THE UNITED STATES

Nos. 210 AND 290.—OCTOBER TERM, 1965.

James T. Stevens, Petitioner,
210 v.
Charles Marks, Justice of the
Supreme Court of New
York, County of New York. On Writ of Certiorari to
the Appellate Division
of the Supreme Court
of New York, First Ju-
dicial Department.

[February 28, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

Proper disposition of these cases is rendered more difficult because of seeming confusion that has attended them all along the line. In the courts below the significance of an important New York statutory amendment was apparently overlooked. This Court granted certiorari limited to a question which, in my view, the record does not present and which the Court does not answer.¹ The judgments below are now reversed on different grounds never properly set forth by petitioner. With this background, a good case could be made for dismissing the writ as improvidently granted. However, I believe briefing and argument have brought to the fore errors sufficiently plain to warrant setting aside these judgments, although my analysis differs from the Court and

¹ Certiorari was limited to the question whether a law is unconstitutional which requires the discharge and bars the rehiring of any public officer who refuses to sign a waiver of immunity and claims his privilege against self-incrimination. 382 U. S. 809.

I consider that a remand, and not an outright reversal, is called for.

It is common ground that petitioner cannot be jailed for refusing to incriminate himself unless either he waived his federal privilege against self-incrimination, or immunity adequate to offset that privilege was conferred upon him. Taking up the first possibility—waiver of the privilege against self-incrimination—it seems to me evident that petitioner was never asked to sign, nor did he sign, a waiver of that privilege. What the New York Constitution and the New York City Charter explicitly require be signed, and what petitioner did in terms sign, is a waiver of immunity from criminal prosecution, that is, a waiver not of the federal privilege but of the state immunity that may be granted to circumvent the privilege.² That a waiver of the privilege and a waiver of immunity may both often lead a witness to incriminate himself is no reason to blur these two different legal concepts. A State in exacting a waiver of the privilege should turn square corners; New York did not ask for nor did it obtain a waiver of the privilege in this instance, so that basis for justifying the contempt convictions is out of the case. The only other basis is a claim that New York has conferred immunity upon petitioner adequate to replace the privilege.

² N. Y. Const., Art. I, § 6, requires "a waiver of immunity against subsequent criminal prosecution" and the New York City Charter, § 1123, requires that one "waive immunity from prosecution." The document signed by petitioner stated that he waived "all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment . . ." N. Y. Penal Law § 2446 states that where any law provides that a person shall not be prosecuted because of his testimony or that testimony he gives shall not be used against him, that person may file a statement "expressly waiving such immunity or privilege."

Before turning to that issue, it should be noted that there can be no reason to consider now whether petitioner's purported waiver of immunity was ineffective or withdrawn. If the Court is right in saying that no statutory immunity was ever conferred and that immunity under the state constitution cannot now be relied on by New York because of *Raley v. Ohio*, 360 U. S. 423, then it is hardly necessary to decide if this never-conferred immunity was adequately waived or the waiver effectively withdrawn. If New York did properly confer adequate immunity and so offset the privilege, then under *Regan v. New York*, 349 U. S. 58, it is irrelevant at this stage whether petitioner has or has not lost the benefits of that immunity through waiver since he is obliged to testify in either event. Adequacy or withdrawal of a waiver of the privilege against self-incrimination might sometimes be relevant at this stage, but no waiver of the privilege was even attempted in this instance as I have noted above. On this phase of the case, it only remains for me to demur to the Court's statement that "we are unable to find any justification for denying the right to withdraw" the waiver (p. 9, *ante*). New York has the very deepest interest in uprooting and punishing misconduct by its officials; it also has a narrower interest in having an investigation, commenced on the premise of a waiver, not suddenly balked by the witness' change of heart. It seems to me there is no federal constitutional reason why a witness who has properly given a voluntary waiver either of his privilege or his immunity should not be held to it.

Turning now to the conferral of immunity as a means of offsetting the privilege and justifying these convictions, I agree with the Court that the pertinent New York statute quite plainly is no longer an automatic immunity statute and that it was not brought into play

in this instance. While further consideration on this score should not be foreclosed on the remand which for reasons later indicated I believe should take place here, *People v. Laino*, 10 N. Y. 2d 161, 218 N. Y. S. 2d 247, seems fairly persuasive that this literal construction of the statute is accurate.³ Disregarding the statute then, the convictions can stand only if immunity adequate to offset the privilege flowed from the state constitution and if petitioner was not misled in his reliance on the privilege. For reasons now set forth, I believe these questions should be decided only after a remand to the state courts.

As construed in *Laino*, the New York Constitution gives automatic immunity only against use of compelled testimony and its fruits, 10 N. Y. 2d, at 173, 218 N. Y. S. 2d, at 657, and the Court today leaves undecided the question whether this immunity is sufficient to supplant the privilege. While the reference to "absolute immunity against further prosecution" in *Counselman v. Hitchcock*, 142 U. S. 547, 586, may point toward a negative answer, I agree that the question ought not be decided until it is necessarily presented after a full briefing and argument by the parties. It is perhaps reason enough for postponement that the negative answer would perforce invalidate one or more federal statutes which

³ In *Laino* the New York Court of Appeals stated that immunity under the state statutes could be acquired only "by strict compliance with the procedural requirements . . ." 10 N. Y. 2d, at 173, 218 N. Y. S. 2d, at 657. N. Y. Penal Law § 2447, governing the procedure for conferring statutory immunity, provides that in the case of a grand jury, the grand jury must be "expressly requested" by the prosecutor to order the witness to answer and the grand jury must give that order; there appears to have been neither request nor order in this case. That courts might "estop" the prosecutor from later prosecuting in these circumstances should not be taken as the deliberate, assured grant of immunity the Constitution requires.

protect only against later use of compelled testimony.⁴ In addition, this Court has recently extended the Fifth Amendment to the States, *Malloy v. Hogan*, 378 U. S. 1, and abolished the "two sovereignties" rule, *Murphy v. Waterfront Comm'n*, 378 U. S. 52, so that an expansive reading of the privilege could have a far more serious impact than was true in the days of *Counselman*.⁵ In all events, the question need not be reached if *Raley v. Ohio*, 360 U. S. 423, governs the instant case.

As I read *Raley*, it holds that the State may not lead witnesses into believing that no immunity provisions are applicable and then, when the witnesses stand on their privilege, hold them in contempt on the ground that immunity provisions supplanted the privilege. In this case the Court apparently believes that statements of the prosecutor and trial court led petitioner to think that no immunity provisions applied to him even contingently; if this is so, then I would agree the State cannot now rely on the state constitution, or the state statute for that matter, to negative petitioner's privilege. However, there are no findings on how petitioner understood the statements made to him and they are certainly susceptible to quite a different interpretation. It may well be that the State meant, and was understood by the petitioner, to convey only that it believed petitioner's waiver of immunity to be valid and irrevocable so that it would attempt to prosecute him on the basis of any testimony he gave. On this reading, it is quite possible that both the State and petitioner believed that adequate immunity provisions were generally applicable to the

⁴ See, e. g., 49 U. S. C. § 9 (1964 ed.). See generally *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 104, n. 6 (concurring opinion of MR. JUSTICE WHITE).

⁵ A number of States appear to provide immunity no greater than that implied by the New York Constitution. See, e. g., Ariz. Rev. Stat. Ann. § 13-384; Conn. Gen. Stat. § 12-2.

extent of supplanting the privilege and that petitioner would be shielded at a later trial if the State there proved to be wrong in its views on waiver.⁶ If so, and assuming the state constitution does in law provide adequate immunity, then petitioner was obliged to testify under *Regan* and was not relevantly misled.⁷ The present record was not formulated with regard to the *Raley* problem, that issue was not briefed in its present form, and it seems to me wrong to decide the point without a remand.

I would vacate both judgments and remand the case to the state courts⁸ so the State may there try to establish that apart from a possible waiver adequate immunity was conferred, and so that petitioner may try to show that he was misled on this score.

⁶ It should be noted that nothing in the record indicates that petitioner raised the *Raley* argument in the lower courts, and that case was not even cited in his petitions for certiorari.

⁷ In a footnote, the Court appears to announce as a new and distinct principle that "[a] State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his" before overriding the privilege (p. 11, n. 10, *ante*). Reading the words "valid immunity" literally, the statement is simply inconsistent with *Regan*. If instead the Court means that immunity—albeit contingent on the invalidity of a waiver—must be "affirmatively demonstrated," regardless of whether the State misled the witness and regardless of whether the witness well knew he had contingent immunity, then I disagree with that proposition which is not supported by *Raley*.

⁸ The case to be so remanded is No. 210; No. 290, which originates in the Federal District Court as a habeas corpus suit should be returned there to await the outcome of any further state proceedings.